Supreme Court, U.S.
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No.

In the Supreme Court of the United States

SOO LINE RAILROAD COMPANY,

Petitioner,

v.

RICHARD WALKER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals misapplied the abuse of discretion standard as set forth in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), in its review of the District Court's decision to exclude or limit expert testimony pursuant to Federal Rule of Evidence 702 and the considerations promulgated by *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the petitioner, Soo Line Railroad Company, which was the defendant in the District Court and the respondent, Richard Walker, who was the original plaintiff in the District Court.

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PETITION FOR WRIT OF CERTIORARI

Soo Line Railroad Company ("Soo Line") respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 31, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 208 F.3d 581 (7th Cir. 2000) and is reprinted in the Appendix hereto at page App. 1. The order entered by the Court of Appeals denying Soo Line's petition for rehearing is reprinted in the Appendix at page App. 19. The order of the United States District Court for the Northern District of Illinois regarding the Motions in Limine is unreported, but is reprinted in the Appendix at App. 20. In addition, the oral rulings of Magistrate Judge Keys regarding the motions in limine at issue are reprinted in the Appendix at App. 21. The judgment entered by the United States District Court for the Northern District of Illinois is reprinted in the Appendix at App. 54.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 2000. A timely Petition for Rehearing was denied on May 31, 2000. (App. 19) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Federal Rule of Evidence 702. Testimony by Experts

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

The respondent, Richard Walker, filed a lawsuit against the Soo Line seeking damages under the Federal Employer's Liability Act, 45 U.S.C. §51, *et seq.*, for injuries that he allegedly sustained while working as a tower operator at the Bensenville train yard. As a tower operator, Walker was responsible for directing railroad cars to certain tracks by operating switches from within the control tower.

On October 25, 1991 at approximately 3:00 a.m., Walker claims that he received injuries from a lightning bolt while he was near his control board. On June 23, 1993, Walker filed his complaint against the Soo Line claiming loss of hearing resulting from the alleged electrical injury. Walker later amended his Complaint to allege that he sustained psychiatric and psychological injuries as a result of the lightning strike instead of the loss of hearing that he earlier claimed. Walker testified that in December 1996, over five years after the occurrence, his lawyers referred him to the Electrical Trauma Research Program at the University of Chicago for the purpose of engaging an expert for trial. Researchers at this program conducted studies on the effects of electrical injuries through facilities provided by

the university and funding provided by utility companies. This funding was later discontinued and the university withdrew its support for the program.

Trial of this matter was set for November 16, 1998 in the District Court for the Northern District of Illinois, Magistrate Judge Arlander Keys presiding. On October 23, 1998, the parties filed their Motions in Limine. The relevant motions filed by Soo Line sought to bar the testimony of Walker's experts, Dr. Neil Pliskin, Dr. Mary Capelli-Schellpfeffer and Dr. Martin Uman based upon the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). After hearing argument on the motions and stating that he had read all materials several times, including the motions and depositions, the District Court granted Soo Line's motion to bar Dr. Capelli-Schellpfeffer and Dr. Uman from testifying at trial and limited the testimony of Dr. Pliskin. (App. 22-23, 31-32, 46-47, 52) Ultimately, the jury entered a verdict in favor of Soo Line and against Walker. (App. 54)

Walker appealed the judgment entered by the District Court. Walker's appeal was premised upon alleged errors made by the District Court with regard to its evidentiary rulings on the parties' Motions in Limine. Specifically, Walker claimed that the District Court had erred in excluding or limiting the testimony of his expert witnesses, Dr. Pliskin, Dr. Capelli-Schellpfeffer and Dr. Uman. In addition, he claimed that it was error to admit the testimony of Frank Denbrock and Dr. Upton as well as his prior mental health records. On September 16, 1999, the Seventh Circuit Court of Appeals, Judges Ripple, Manion and Diane. P. Wood, heard oral argument and, on March 31, 2000, the Seventh Circuit reversed the jury verdict and remanded the case to the District Court. *Id.* at 581. (App. 18) In purported reli-

ance on *General Electric v. Joiner*, 522 U.S. 136 (1997), *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), and the Federal Rules of Evidence, the Seventh Circuit found that the District Court had abused its discretion by excluding the expert testimony of Dr. Capelli-Schellpfeffer and Dr. Uman and limiting the expert testimony of Dr. Pliskin. *Id.* at 587-590. (App. 5-14) On May 30, 2000, the Seventh Circuit denied Soo Line's Petition for Rehearing. (App. 19) This Petition then followed.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S HOLDINGS IN *DAUBERT v. MERRELL DOW PHARM.*, AND *GENERAL ELECTRIC v. JOINER* REGARDING THE ADMISSIBILITY OF EXPERT TESTIMONY.

Through *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), and its progeny, *General Electric v. Joiner*, 522 U.S. 579 (1997), and *Kumho Tire v. Carmichael*, 526 U.S. 137 (1999), this Court sought to resolve the confusion relating to the admissibility of expert testimony. The Seventh Circuit's decision in the case at bar, however, demonstrates that judges continue to miscontrue the principles set forth in *Daubert, supra,* as well as the reviewing court's role with respect to *Daubert* rulings. Due to the persistent misunderstanding and misapplication of *Daubert* and its progeny, this Court must review Soo Line's petition in order to prevent further inconsistency and align the Seventh Circuit which willfully refuses to abide by the principles and standards set forth by this Court with regard to the admissibility of expert testimony.

A. The Seventh Circuit's Decisions Regarding The Admissibility Of Expert Testimony Demonstrate Its Failure to Appropriately Review These Rulings Under The Abuse Of Discretion Standard Set Forth In *General Electric v. Joiner* and *Kumho Tire v. Carmichael.*

In its opinion, the Seventh Circuit correctly noted that the appropriate standard of review of a district court's evidentiary ruling is the abuse of discretion standard. *Walker,* 208 F.3d at 586 (App. 4); *see also General Electric*, 522 U.S. at 142; *Kumho Tire*, 526 U.S. at 152. Although the proper standard of review was identified by the Court, the Seventh Circuit's analysis and ultimate decision indicate that it usurped the gatekeeping role of the District Court described in *Daubert*, *supra*, and misapplied the abuse of discretion standard set forth in *General Electric v. Joiner*, *supra*, and *Kumho Tire v. Carmichael* in its review of the District Court's decision and reversal of its findings. If the Seventh Circuit had applied the abuse of discretion standard in accordance with *General Electric* and *Kumho Tire*, it would have upheld the District Court's rulings. As the Seventh Circuit refuses to comply with the Supreme Court's directives regarding the admission of expert testimony, including the reviewing court's role with regard thereto, this Court must review the Seventh Circuit's decision to ensure further compliance with the objectives of *Daubert*.

In *General Electric Co. v. Joiner*, the U.S. Supreme Court clearly set forth that a reviewing court is to apply the abuse of discretion standard when reviewing a district court's reliability determination regarding expert testimony. *Id.* at 142. In *Kumho Tire*, this Court found that "the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliabil-

ity determination." *Id.* at 142. If the district court is not afforded wide latitude in its determination, it "would lack the discretionary authority needed both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises." *Id.* at 152. In *Kumho Tire*, this Court found that the district court had "considerable leeway" in determining whether the particular testimony of an expert is reliable. *Id.* at 152.

The panel of judges reviewing the case at bar apparently adopted its own "definition" of the abuse of discretion standard rather than applying it in accordance with the mandates of the Supreme Court or the applications of other Circuits. The Seventh Circuit previously appeared to comply with *Daubert*, however, recent decisions, including the decision of the panel in the case at bar, indicate that the Seventh Circuit is diverging from the other federal courts with respect to the issues addressed in *Daubert*. Several courts have found that courts of appeal should not reverse under an abuse of discretion standard unless the ruling is "manifestly erroneous." *See General Electric*, 552 U.S. at 142; *see also, United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000) (*quoting Joiner*, 552 U.S. at 142). In *United States v. Cheska*, 202 F.3d 947, 950 (7th Cir. 2000), the Seventh Circuit stated the following regarding its application of the abuse of discretion standard:

> We are not here, of course, to reweigh the considerations of the district court, or to decide if we would have come out the other way. When reviewing the district court's ruling for abuse of discretion, we reverse *only if we have a "strong conviction of error."*

(Emphasis added.) In *Ladien v. Astrachan*, 128 F.3d 1051, 1056 (7th Cir. 1997), the Seventh Circuit found that it was *obligated to affirm a decision* under the abuse of discretion standard unless:

> it is clear that *no reasonable person* could concur in the trial court's assessment of the issue under consideration. The abuse of discretion standard means something more than our belief that we would have acted differently if placed in the circumstance confonting the district judge. *To disagree with the district court's decision and to find that the court abused its discretion are two different things*. The district court's decision must strike us as *fundamentally wrong* for an abuse of discretion to occur.

(Emphasis added.) Similarly, in *Jackson v. Bunge Corp.*, 40 F.3d 239, 246 (7th Cir. 1994), the court stated that the abuse of discretion standard places a heavy burden on the appellant because "the relevant inquiry is not how the reviewing judges would have ruled if they had been considering the case in the first place, but rather, whether *any reasonable person could agree* with the district court." (Emphasis added.)

As these definitions of the standard reveal, the review of the district court's decision regarding the admissibility of expert testimony is not merely a forum in which the Court of Appeals may simply disagree with the lower court's determination and impose its own personal beliefs. Rather, the reviewing court must defer to the findings of the district court in the absence of striking or fundamental error. Moreover, the Court of Appeals has an *affirmative obligation* to affirm the district court unless "no reasonable person could concur" with the district court's decision. As such, if even one reasonable person could agree with the district court, the decision should be affirmed. The standard is extremely deferen-

tial and affords the district court wide latitude in its decision-making capabilities.

Despite the seemingly impossible hurdle that an appellant must overcome to reverse the district court's determinations regarding the admissibility of expert testimony, the panel of judges reviewing this case purportedly applied the abuse of discretion standard and reversed the District Court's decision to exclude or limit the testimony of Walker's experts. This anomaly resulted from the reviewing panel's abuse of *its* discretion in its purported review of the District Court's findings. The reviewing court's opinion illustrates that it did not follow the abuse of discretion standard but instead used the appellate process as an opportunity to voice its disagreement with the discretion afforded the district court in the application of the *Daubert* standard. The U.S. Supreme Court has spoken, on multiple occasions, regarding the standards for admitting expert testimony. *See Daubert, supra*; *General Electric, supra*; *see also, Kumho Tire, supra*. Therefore, this matter is not open for interpretation by the individual circuits. The Seventh Circuit must follow the directives of the U.S. Supreme Court regardless of its opposition to the principles, objectives and standards of *Daubert*. Throughout its opinion, the Seventh Circuit fails to afford the requisite deference to the findings of the District Court and instead engages in its own reweighing of the considerations that faced the District Court. Furthermore, Section B, *infra*, establishes that not only could a reasonable person concur with the District Court's decision to exclude certain experts based on the unreliability of their testimony but that the District Court's decision was unquestionably correct under the *Daubert* standard.

B. The Seventh Circuit's Determinations With Regard To The Admissibility Of Expert Testimony Conflict With The Principles, Standards And Objectives Set Forth In *Daubert v. Merrell Dow Pharm.*

In *Daubert*, *supra*, this Court suggested four non-exhaustive factors to consider in determining whether an expert opinion is sufficiently helpful to the trier of fact and is grounded in scientific knowledge. These factors are (1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) what is the known rate of error of a technique or theory when applied; (4) what standards exist to control the operation of the technique; and (4) whether the theory or technique has gained "general acceptance" in the scientific community. 509 U.S. at 592-94. The court must not only determine that the reasoning and methodology underlying the testimony is scientifically valid but also that the reasoning and methodology can properly be applied to the facts at issue in the case. *Id.* at 592-93. An expert must base his opinions on facts and data of a type reasonably relied upon by experts in the field. *Id.* at 595. "[B]ald assurances of validity" by an expert, however, will not suffice to satisfy the *Daubert* analysis. *United States v. Saya,* 961 F. Supp. 1395, 1397 (Haw. 1996) (*citing Daubert*, 43 F.3d 1311 (9th Cir. 1995)). Furthermore, even if an expert's testimony does satisfy the *Daubert* test, the court still can conclude that under Federal Rule of Evidence 403, its probative value is substantially outweighed by the danger of unfair prejudice and confusion and the possibility that it would mislead the jury. *Id.* at 1397.

More importantly, however, *Daubert* mandated that the district courts act as the "gatekeepers" who assume the responsibility for keeping "junk science" from the

jurors. *Id.* at 596-97. These gatekeepers must ensure that the expert testimony presented is not only relevant, but reliable. *Daubert* recognized the danger of presenting pseudoscience to a jury through the medium of expert testimony; according to this Court, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Id.* at 595. Moreover, *Daubert* recognized that by acting as gatekeeper, the trial judge will prevent the jury from hearing some insightful and innovative evidence yet according to this Court, "[t]hat nevertheless is the balance that is struck by the Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes." *Id.* at 597. Although *Daubert* clearly sets forth the gatekeeping role of the district court and the importance of preventing the admission of junk science, the Seventh Circuit's decision illustrates either its misperception of or refusal to apply these principles.

In this case, the District Court properly discharged its duty as "gatekeeper" with respect to the admissibility of the testimony of Plaintiff's experts, Dr. Pliskin, Dr. Capelli-Schellpfeffer and Dr. Uman. The District Court reviewed the opinions and proffered testimony of these three experts in light of the factors set forth in *Daubert, supra*. After giving substantial consideration to all of these matters, the District Court, in its discretion, excluded the testimony of these experts finding that it was unreliable and that its admission would not assist the trier of fact. An examination of the aforementioned experts' opinions in light of the factors for reliability set forth in *Daubert* highlights the juxtaposition of the propriety of the District Court's ruling and the erroneous reasoning of the Seventh Circuit. Such analysis illustrates the Seventh Circuit's failure to comply with the directives of *Daubert*.

1. Under the *Daubert* Standard, Dr. Pliskin's Testimony Regarding Pre-Injury I.Q. Should Have Been Excluded As Unreliable And Because It Would Not Assist The Trier Of Fact.

The Seventh Circuit found that the District Court erred in excluding the testimony of Dr. Pliskin finding that: (1) Dr. Pliskin had employed a proper methodology; (2) he relied upon appropriate sources of information; and (3) his testimony would have assisted the jury with a fact at issue. 208 F.3d at 586-87. (App. 5-8) In reaching its conclusion, however, the Seventh Circuit disregarded Dr. Pliskin's inappropriate reliance on a falsified educational and mental history of Walker and Dr. Pliskin's inability to definitively opine on the issue for which his testimony was offered. Moreover, the Seventh Circuit's finding that these suspect issues would be appropriate for jury consideration completely ignores the theory and purpose behind the *Daubert* decision. It is imperative that uninformed, unreliable and irrelevant expert testimony not be presented to the jury due to the great potential for misuse, yet this Court's decision simply opens the Pandora's box which *Daubert* attempted to close.

As the basis for its decision to admit the testimony of Dr. Pliskin, the Seventh Circuit relied upon only one self-serving and somewhat inapplicable case, *Cooper v. Carl A. Nelson & Co.*, 211 F.3d 1008 (7th Cir. 2000). The Seventh Circuit, namely the exact same panel of judges, decided *Cooper* only twenty-four days before issuing the decision in the case at bar. Like the instant case, the plaintiff in *Cooper* had provided the expert with an inaccurate history upon which the expert relied in formulating his opinions. *Id.* at 1019-20. Because the erroneous medical history was the basis for the expert's diagnosis and conclusions, the district court excluded the expert's testimony as well as the testimony of other

physicians who had relied upon the inaccurate history as unreliable. *Id.* at 1020. In *Cooper*, the Seventh Circuit found that the testimony should have been admitted because the methodology of relying upon patient histories and examination which was employed by the expert was appropriate. *Id.* In addition, the Seventh Circuit found that the accuracy and truthfulness of the underlying history could be subjected to cross-examination and evaluation by the jury. *Id.* at 1021.

The differences between *Cooper*, *infra*, and the case at bar are striking. Clearly, the decision in *Cooper* appears cosmetically to be reliable because the Seventh Circuit attempts to treat it as having precedential value in a subsequent case. Notwitshtanding, the Seventh Circuit, namely the panel of Ripple, Manion and Wood, however, erred in both decisions by considering the experts' methodologies in a vacuum and by permitting the jury to assess the suspicious matters rather than allowing the District Court to discharge its duties as "gatekeeper" as it is obligated to do under *Daubert.* Furthermore, the Seventh Circuit's statement that the credibility of the underlying history can properly be tested through cross-examination and jury evaluation, which was reiterated by the Seventh Circuit in the case at bar, further indicates the Seventh Circuit's willful refusal to apply *Daubert*. In *Daubert*, the U.S. Supreme Court specifically stated that cross-examination and instructions to the jury constitute appropriate safeguards only where *the basis of the scientific testimony meets the standards of Rule 702.* 509 U.S. at 596. Moreover, the Supreme Court stated that one of the objectives for instituting a gatekeeper of evidence was to prevent a "free-for-all" that would confound befuddled juries with pseudoscientific assertions. *Id.* at 595. In both *Cooper* and *Walker*, it was underlying history that was the basis of the "scientific testimony" which the District

Court found unreliable. Therefore, the scientific testimony was itself inadmissible under Rule 702 and *Daubert*. Cross-examination and evaluation of an unreliable basis for expert testimony is not an appropriate safeguard. The Seventh Circuit's proffered recommendation is clearly premised on a pre-*Daubert* approach to the admission of expert testimony.

An expert's use of generally accepted methodology cannot vindicate a conclusion for which there is no underlying scientific basis. *Black v. Food Lion, Inc.*, 171 F.3d 308, 314 (5th Cir. 1999). Where an expert's testimony is based upon erroneous assumptions or inaccurate information it may be properly excluded. *Dukes v. Illinois Central Railroad Co.*, 934 F. Supp. 939, 951 (N.D. Ill. 1996) (court barred expert testimony as unreliable in part because his conclusions were based on history provided by plaintiff and expert testified that the reliability would be affected if history was not accurate); *Barrett v. International Armaments, Inc.*, 1999 WL 199253 (N.D. Ill. 1999) (expert testimony was barred where it was premised on false assumption that safety on gun was disengaged).

In the instant matter, Dr. Pliskin's testimony was fatally flawed under the *Daubert* standard. Dr. Pliskin intended to offer opinions comparing Walker's purported pre-injury IQ with his current IQ. Dr. Pliskin's opinions were based on his analysis of the results of neuropsychological tests given to Walker considered in conjunction with Walker's mental and educational history. First and foremost, all of the tests utilized to establish Walker's pre-injury *and* post-injury IQ were performed over five years after the accident on December 10, 1996 and December 12, 1996. (App. 23) Dr. Pliskin had never examined Walker prior to October 25, 1991 when the alleged injury occurred. (App. 23) In essence, Dr. Plis-

kin claimed to be able to establish *both* pre-injury *and* post-injury IQ by testing the same individual's mental faculties on the same date several years after the alleged injury. Logically, this does not seem plausible.

Moreover, Soo Line established prior to trial that Walker had provided an inaccurate mental and educational history to Dr. Pliskin. Even Dr. Pliskin admitted that these histories were factors considered by him in his evaluation of Walker's pre-injury IQ. The inaccuracies contained in Walker's account of his history were not minor, but rather they were substantial and established by unimpeachable exhibits. With regard to his educational background, Walker claimed that he attended college for two years when in reality, his transcripts indicated that he had completed only one semester. (App. 24) He further claimed that he had an A average while his transcripts indicated that he actually had a failing average. (App. 24) Walker had failed five classes and received a D in two others. (App. 24) The only classes in which he received a grade of A were band and applied tuba. (App. 24) Moreover, his academic records belied his claim that he was a good student in high school. (App. 24) Walker's high school transcript indicated that he was in the lowest quarter of his class. Walker's true educational history was markedly different than that provided to and relied upon by Dr. Pliskin.

With regard to his mental history, Dr. Pliskin relied upon Walker's statement that "he had seen a psychiatrist about 25 years ago for personal reasons." Actually, Walker was treated periodically at a state psychiatric hospital over a six-year period. In 1973, Walker spent eight weeks as a patient at the psychiatric hospital where he was diagnosed with schizophrenia. He was readmitted in 1978 and again treated for schizophrenia.

On these occasions and during out-patient care, Walker was treated with various psychotropic drugs which were shown to be capable of altering one's mind.

Walker's self-proclaimed mental and educational history were primary factors relied upon by Dr. Pliskin for his evaluation and opinions regarding Walker's pre-injury IQ and clearly the information relied upon and forming the basis for his opinions was false. Dr. Pliskin stated that any significant deviation from the mental and educational history provided to him by Walker would impact his analysis and, in turn, his opinions. (App. 24, 27) Furthermore, Dr. Pliskin admitted in his deposition that his methodology of employing neuropsychological tests to evaluate the effect of electric energy on a person's IQ has not been subject to substantial testing or peer review. Despite Dr. Pliskin's own acknowledgments regarding the detrimental effect of an inaccurate history on his opinion and the lack of credible review of his particular method of testing pre-injury IQ, the Seventh Circuit overlooked these flaws and chose instead to focus upon the propriety of the general methodology used by Dr. Pliskin, namely his reliance on patient histories as a basis for his opinions. Although it may be proper for experts to rely on histories provided to them as the basis for their opinions, it is preposterous to infer that *Daubert* permits an application of this premise whereby experts are allowed to rely on *false* histories as long as their methodology is technically appropriate. If the underlying bases of an opinion are erroneous and unreliable, it certainly follows that the opinion, itself, is equally flawed and unreliable.

The District Court reasonably found that the bases of Dr. Pliskin's opinions were seriously flawed and tainted by unreliability. Demonstrating its careful consideration

and weighing of the evidence, the District Court excluded only Dr. Pliskin's opinions regarding pre-injury IQ. The District Court did not bar Dr. Pliskin's testimony in its entirety but rather admitted his testimony regarding Walker's current IQ. Because the basis for Dr. Pliskin's testimony regarding pre-injury IQ was unreliable, the District Court found, in accordance with *Daubert*, that Dr. Pliskin's opinions would not assist the jury. In *Daubert*, the Court suggested that courts consider the known or potential rate of error in assessing scientific reliability. 509 U.S. at 594. Clearly, where the data relied upon is incorrect, the potential rate of error for the opinions drawn therefrom is extremely high. Moreover, the utter lack of similar tests in the field hinders the ability to assess error rates. The Seventh Circuit, however, chose to ignore the findings of the Supreme Court in *Daubert* regarding these hallmarks of unreliability and instead erroneously concluded that a jury should be allowed to hear unreliable testimony assuming that the effect of admission of nonscientific and irrelevant testimony can be countered by instructions to the jury to weigh the reliability of that evidence. The Seventh Circuit's erroneous decision strips *Daubert* of the stringent guidelines that it places on the admission of expert testimony.

Most importantly, Dr. Pliskin's testimony could never have assisted the trier of fact because he admittedly could not even offer an opinion on the issue of causation. (App. 25) Dr. Pliskin's testimony was offered to demonstrate that Walker experienced a decline in functioning *as a result of this injury*. In his deposition, Dr. Pliskin testified that "no one has yet proven scientifically that an electrical shock leads to lower IQ scores." Moreover he stated that he does not have an opinion as to whether the results of the test administered to Walker through his electrical trauma unit are

directly related to the injury which was alleged in his complaint. (App. 25) The Seventh Circuit, however, again found a way to avoid the U.S. Supreme Court's mandate and suddenly held that an expert need not have an opinion on an ultimate question in order to testify. *Walker,* 208 F.3d at 587. (App. 7-8)

Daubert requires that testimony "assist the trier of fact to understand the evidence or determine a fact in issue." *Id.* at 591, 113 S.Ct. at 2795. "Expert testimony which does not relate to any issue in the case is not relevant and ergo, non-helpful." *Id.* For testimony to be helpful, it must have a valid scientific connection to the pertinent inquiry to be admissible. *Id.* at 592. Dr. Pliskin's testimony initially was offered expressly for the purpose of providing an opinion on the ultimate question of whether the alleged injury caused a decline in Walker's mental functioning. In his deposition, however, Dr. Pliskin admitted that he could not say whether Walker's injuries were directly related or caused by the accident at issue. Thus, Dr. Pliskin's testimony clearly is not helpful as it is not scientifically connected to the pertinent inquiry for which Walker proffered Dr. Pliskin's testimony. Because Dr. Pliskin's testimony cannot assist the trier of fact, it was properly excluded.

In rendering its decision to admit or exclude testimony, the trial court is granted broad latitude in deciding how to test an expert's reliability. *Kumho Tire Co.,* 526 U.S. at 142. The Court should consider the specific factors in *Daubert* where they are reasonable measures of reliability of an expert's testimony. *Id.* A reviewing court should not reverse the trial court's evidentiary ruling relating to the admissibility of expert opinion testimony absent a finding that the trial court abused its discretion. *Joiner*, 522 U.S. at 142; *see also, Kumho Tire Co.*, 526 U.S. at 152. The District Court

properly and carefully discharged its gatekeeping duties by excluding the testimony of Dr. Pliskin regarding pre-injury IQ which was tainted by unreliability. It was unquestionably reasonable for the District Court to find that Dr. Pliskin's opinions regarding pre-injury IQ were unreliable where he relied upon a falsified history as the basis for his opinion and it was unquestionably reasonable for the District Court to find that Dr. Pliskin's testimony would not assist the jury because he could not offer an opinion on the issue for which his testimony was proffered. It was unreasonable, however, for the Seventh Circuit to reverse the District Court's decision to exclude Dr. Pliskin's testimony regarding pre-injury IQ despite its claim that it was applying the principles of *Daubert* and reviewing the decision under the abuse of discretion standard. If this matter is remanded and the order of the Seventh Circuit stands, it will require a District Court to allow the jury to hear and consider the admittedly irrelevant testimony of an expert. The Seventh Circuit's decision demonstrates its willful refusal to abide by the directives of *Daubert*, *supra*, *Kumho Tire*, *supra*, and *General Electric*, *supra*.

2. Under The *Daubert* Standard, The Testimony Of Dr. Capelli-Schellpfeffer Should Have Been Excluded Because Her Testimony Was Inherently Unreliable.

The Seventh Circuit found that the District Court had erred in excluding the testimony of Dr. Capelli-Schellpfeffer, finding that: (1) she was qualified to testify; (2) she relied upon a proper methodology; and (3) her testimony was reliable. *Walker*, 208 F.3d at 588-89. (App. 9-12) The Seventh Circuit's decision was premised upon flawed reasoning and inapposite case law.

In reviewing this aspect of the District Court's decision, the Seventh Circuit again focused upon the methodology used by Dr. Capelli-Schellpfeffer in order to assess the reliability of her expert testimony. *See id.* The Seventh Circuit relied upon the premise that it is appropriate for medical professionals to rely upon the opinions, observations and tests of other medical professionals in their field. *Id.* at 588. The cases relied upon by the Seventh Circuit were decided prior to *Daubert* and do not even utilize a comparable standard. *See e.g. Birdsell v. United States*, 346 F.2d 775 (5th Cir. 1965); *Durflinger v. Artiles*, 727 F.2d 888 (10th Cir. 1984). Moreover, *Daubert* specifically provides that the relaxation of the requirement that an expert base his/her opinions on first hand knowledge is "premised on the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.* at 592.

After the Supreme Court's decision in *Daubert*, the standard governing the admission of expert testimony is certainly more stringent. Post-*Daubert*, experts are expected to have a wider basis for their decisions than mere subjective analysis of other expert opinions. *Stasior v. Nat. Railroad Passenger Corp.*, 19 F. Supp. 2d 835 (N.D. Ill. 1998) (expert's opinion unreliable where he lacked training, failed to cite scientific studies, conduct tests, or collect and compare data). The Seventh Circuit seemed to suggest that Dr. Capelli-Schellpfeffer's role as leader of a clinical team magically instilled within her the knowledge, training and expertise of the individual members of her clinical team. *See Walker*, 208 F.3d at 589. (App. 12) This is a gross misconception which is illustrated by Dr. Capelli-Schellpfeffer's own testimony. Throughout her deposition, she repeatedly deferred to the findings and opinions of Dr. Pliskin to whom she had referred Walker. (App. 36-37)

Her inability to state her own opinions or rely on her own analysis highlights her deficient qualifications and lack of expertise. As such, the District Court correctly recognized the questionable and unreliable nature of her testimony and properly excluded her.

Moreover, the Seventh Circuit has reviewed Dr. Capelli-Schellpfeffer's methodology in a vacuum rather than evaluating its effect in practice. In fact, the method used by Dr. Capelli-Schellpfeffer resulted in her using the flawed analysis and evaluation of Dr. Pliskin as the basis of her opinions which makes her testimony as equally unreliable as Pliskin's opinions. In her deposition, Dr. Capelli-Schellpfeffer testified that in evaluating patients to determine the effect of electrical exposure she needs personal and event history as well as information regarding their mental functioning both before and after the accident to determine if there has been a decline. (App. 37) Dr. Capelli-Schellpfeffer only met with Walker twice before referring him to other physicians in her clinical group including Dr. Pliskin. She then reviewed and relied upon Dr. Pliskin's analysis regarding Walker's pre-injury IQ to determine whether there was a decline in his mental functioning. As previously discussed *supra*, Dr. Pliskin considered false information as a substantial factor on which he based his conclusions and as such his opinions regarding Walker's mental functioning are inherently flawed and unreliable. In turn, Dr. Capelli-Schellpfeffer's opinions are equally unreliable since they are based upon Dr. Pliskin's conclusions regarding Walker's mental functioning rather than Dr. Capelli-Schellpfeffer's independent analysis. (App. 32) It is irrelevant that Dr. Capelli-Schellpfeffer may have utilized a technically proper methodology because it is the information she gained through this method and which she relied upon as the basis for her opinion that is substantially

flawed and unreliable. In accordance with *Daubert*, Dr. Capelli-Schellpfeffer's testimony was properly excluded since she is relying on second-hand knowledge and information which was shown to be unreliable.

Furthermore, it was reasonable for the District Court to find that Dr. Capelli-Schellpfeffer's testimony was unreliable because while she is not a psychiatrist or psychologist she formulated opinions regarding post-traumatic stress disorder, a psychological condition on which she is not qualified to render opinions. (App. 33-35, 40) The district court should be skeptical about offered testimony of a witness outside his or her normal area of practice. *Jones v. Royalton Food Service Equipment Co.*, 1998 WL 792184 at *6 (N.D. Ind. 1998). Dr. Pliskin, a psychologist, found that Walker did not suffer from post-traumatic stress disorder. (App. 25) Despite having relied upon Dr. Pliskin's observations, analysis and opinions and lacking requisite training or expertise in the relevant field, Dr. Capelli-Schellpfeffer reached the contrary conclusion that Walker *did* suffer from post-traumatic stress disorder. (App. 33-35, 40) Rather than recognizing this as an indication of unreliability, the Seventh Circuit rationalized it by relying upon an inapposite case. According to the Seventh Circuit, "[t]hat two different experts reach opposing conclusions from the same information does not render their opinions inadmissible." *Walker*, 208 F.3d at 589 (*quoting Allapattah Services, Inc. v. Exxon Corp.*, 61 F. Supp. at 1341). (App. 11) The Seventh Circuit, however, failed to recognize the glaring distinction between *Allapattah Services* and the case at bar. In *Allapattah*, the Court was faced with "dueling experts" for *opposite parties*. *Id.* at 1341. Clearly, an expert for one party is expected to contradict or oppose the opinions and conclusions of the other party's expert. In the case at bar, given the fact that the experts were both retained by Walker, their testimony should have been consistent. Because Pliskin

and Dr. Capelli-Schellpfeffer offer contradictory opinions based on the same underlying information and they were retained by the same party, it casts a grave shadow of doubt on the reliability of the opinions of both experts. In addition, the conflicting testimony is ineffectual to the trier of fact. The shadow of unreliability is even greater where the expert is opining outside of her area of practice. Dr. Capelli-Schellpfeffer's second-hand reliance on the findings and conclusions of Dr. Pliskin as the basis for her opinions does not meet with the standards of *Daubert* as she cannot fulfill the requisite assumption that her opinions have a reliable basis in the knowledge and experience of her discipline. As such, Dr. Capelli-Schellpfeffer's opinion that Walker suffered from post-traumatic stress disorder was properly excluded by the District Court from the jury.

The District Court properly discharged its gatekeeping duties by excluding the testimony of Dr. Capelli-Schellpfeffer. It was unquestionably reasonable for the District Court to find her opinions unreliable where she relied upon conclusions of another expert which were based on false data and whose testimony was inadmissible. It was unquestionably reasonable for the District Court to find her opinions regarding post-traumatic stress disorder to be unreliable where she was not a psychiatrist or psychologist and where her opinion on this subject contradicted the opinion of another expert who was retained to testify for Walker and upon whose opinions she relied as a basis for her opinion. It was unreasonable for the Seventh Circuit to reverse the District Court's decision despite its claim that it was applying the factors of *Daubert* as well as reviewing the lower court's decision under an abuse of discretion standard. The Seventh Circuit's decision demonstrates its willful refusal to abide by the directives of *Daubert, supra*.

3. Under The *Daubert* Standard, The Testimony Of Dr. Uman Should Have Been Excluded Because His Opinions Relating To Causation Were Unreliable.

The Seventh Circuit found that the District Court erred in excluding the testimony of Dr. Uman finding that: (1) Uman should have been permitted to offer alternative scenarios as to how lightning could have penetrated the tower; and (2) that the alternative scenarios would have assisted the jury. *Walker*, 208 F.3d at 589-90. (App. 12-14) Although Walker claimed and the Seventh Circuit found error based on the District Court's decision to exclude the testimony of Dr. Uman, this alleged error was clearly harmless since ultimately, the District Court found that counsel for Soo Line had opened the door to Dr. Uman's testimony. Dr. Uman was permitted to testify regarding his opinions as to how lightning had entered the tower. The ultimate admission of Dr. Uman's testimony illustrates the absurdity of the Seventh Circuit's opinion in which it found that the District Court's rulings did not constitute harmless error. (App. 17) Regardless, Soo Line asserts that the District Court's initial decision to exclude Dr. Uman's testimony was reasonable and proper.

Dr. Uman was retained by Walker to hypothesize regarding possible scenarios whereby an electrical shock could have reached him within the tower in which he was working thereby causing injury. Dr. Uman concluded that there were three possible scenarios as to how the alleged accident could have occurred. (App. 49, 52) Dr. Uman's opinions, however, amount to no more than speculation, guess and conjecture which cannot satisfy the stringent standards of reliability mandated by *Daubert*.

Initially, Dr. Uman relied upon the opinion of another expert retained by Walker who stated that there was a fifty-percent (50%) chance that lightning struck, at the time of the alleged accident, within a five mile radius of the tower in which Walker was working. Accordingly, this conclusion concedes that there was a fifty-percent (50%) chance that lightning did not strike within the five mile area during that time. Therefore, the underlying basis of Dr. Uman's subsequent opinions and theories is an unsubstantiated assumption that lightning actually struck. Moreover, Dr. Uman surmises that if lightning did strike, there were three alternative means by which it could have injured Walker. It might have directly hit the tower in which Walker was working or it might have struck a nearby tower. Additionally, it might have struck the rail in the yard that was connected to the switch which Walker was touching at the time of the strike. Dr. Uman admitted, however, that if it struck another rail in the yard that was not connected to that switch it would not have injured Walker. Dr. Uman offered no scientific basis for his belief that the injury could have occurred in one of these three manners. He was not able to substantiate any of these theories through physical evidence nor was he able to rule other alternatives out. In addition, he was not able to rule out the possibility that lightning did not strike at all. Each scenario constitutes nothing more than speculation based wholly on an assumption that lightning actually struck within the area at a given time.

The Seventh Circuit's decision to admit the testimony of Dr. Uman ignores the breadth of decisions in which the court has excluded expert opinions on the issue of causation because the expert failed to reject other possible theories. *See Bauer v. J.B. Hunt Transport,* 150 F.3d 759, 765 (7th Cir. 1998) (expert testimony as to factors that could contribute to collision excluded be-

cause court found that jury could have only speculated as to causal connection between factors identified and events at issue in case); *Driggs v. Sofamor*, 44 F. Supp. 2d 760, 765 (M.D.N.C. 1998) (no competent evidence of causation where expert failed to rule out other causes); *Zarecki v. National Railroad Passenger Corp.*, 914 F. Supp. 1566, 1573 (N.D. Ill. 1996) (expert must rule out subjective belief or unsupported speculation); *Menges v. Depu Motech, Inc.*, 61 F. Supp. 2d 817, 825 (N.D. Ind. 1999) (expert's testimony failed to meet standards set forth by *Daubert* where he did not consider and reject any other viable causes for plaintiff's problem); *Lawson v. Smith*, 1999 WL 1129677 at *4 (N.D. Ga. 1999) (expert failed to eliminate other possible causes of condition such that he could properly testify on causation). Moreover, courts applying the *Daubert* standard have consistently held that experts cannot speculate when offering opinions. *DePaepe v. GM Corp.*, 141 F.3d 715, 720 (7th Cir. 1998); *see also Barrett*, 1999 WL 199253 (N.D. Ill. 1999) (expert testimony must be grounded on scientific knowledge and not based on speculation). "[T]he courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it." *Rosen v. CIBA-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996).

Instead of following precedent, the Seventh Circuit chose instead to rely upon two inapposite cases to support its finding that Uman should have been permitted to testify to alternative causation theories. (App. 13) Both cases, however, related to alternative damage calculation models. *Cole v. Control Data Corp.*, 947 F.2d 313, 319 (8th Cir. 1991); *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 558-59 (8th Cir. 1990). In *Cole*, the court noted the critical distinction between alternative causation theories and damage models, finding that *the existence*, and not the amount of damages,

must be proven with reasonable certainty. In these cases, the issues raised by the expert's opinion pertained to calculations that quantify the plaintiff's damages yet all of the proposed alternatives resulted in the award of damages to the plaintiff. In the case at bar, the very premise of Walker's claim, whether an injury could have occurred or in essence whether damages actually exist, is uncertain depending upon which of the alternatives proposed by Uman the jury believes. Unlike the cases relied upon by the Seventh Circuit, those cases relating to expert theories of causation indicate that expert testimony will not be reliable *unless* other possibilities are eliminated. Therefore, testimony relating to alternative theories for damages and causation are treated quite differently despite the Seventh Circuit's failure to recognize this distinction.

The District Court properly discharged its gatekeeping duties by excluding the testimony of Dr. Uman. It was unquestionably reasonable for the District Court to find that Dr. Uman's testimony was unreliable as he could only speculate regarding three alternative theories for how lightning might have entered the tower, if at all. Dr. Uman's opinions constitute speculation built on speculation. To deem these opinions scientifically reliable or to consider these theories as scientific methodology opens the floodgates to the admission of junk science in the courtroom thereby defeating the objectives of *Daubert*. It was unreasonable for the Seventh Circuit to reverse the District Court's decision to exclude Uman's testimony despite its claim that it was applying the abuse of discretion standard. The Seventh Circuit's decision demonstrates its willful refusal to abide by the directives of *Daubert, supra*.

CONCLUSION

The Seventh Circuit's review of the District Court's rulings regarding the exclusion of expert testimony establishes a clear conflict between the directives of the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals* and the Seventh Circuit's application of these principles and objectives. The Seventh Circuit has not only undermined the policies of *Daubert* regarding expert testimony but also through its review of the District Court rulings it has warped the abuse of discretion standard set forth in *General Electric v. Joiner* and *Kumho Tire v. Carmichael*. *Daubert* sought to resolve issues of reliability and relevance with regard to expert testimony. In doing so, *Daubert* further established who is responsible for evaluating expert testimony to determine whether it bears the hallmarks of reliability rather than simply presenting misleading and confusing evidence to the jury for its consideration. It is evident from the decision on appeal that the Seventh Circuit does not agree with the Supreme Court's decision in *Daubert* as to both determinations of reliability and to whom such responsibility has been granted. Their disagreement with the Supreme Court's directives, however, is irrelevant since lower courts must comply with Supreme Court decisions to create uniformity. The Seventh Circuit has usurped the District Court's role as gatekeeper which it had discharged in a well-reasoned manner given the nature of the expert testimony presented. Rather than executing its review in accordance with the abuse of discretion standard, the Seventh Circuit reconsidered the evidence and reversed the District Court's rulings based on its disagreement with the District Court's findings and in the absence of striking error.

The Soo Line Railroad respectfully requests that this Court review its Petition in order to resolve the fundamental incompatibility of the Seventh Circuit's opinions with the decisions issued by this Court in *Daubert*, *General Electric v. Joiner* and *Kumho Tire*. By doing so, this Court can further clarify *Daubert* and align the Seventh Circuit thereby preventing any further distortion of the principles, objectives and directives regarding the admissibility of expert testimony.

Respectfully submitted,

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In the
United States Court of Appeals
for the Seventh Circuit

No. 98-4237

RICHARD WALKER,

Plaintiff-Appellant,

v.

SOO LINE RAILROAD COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 3861—**Arlander Keys**, Magistrate Judge.

ARGUED SEPTEMBER 16, 1999—DECIDED MARCH 31, 2000

Before RIPPLE, MANION and DIANE P. WOOD, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Richard Walker filed this action against the Soo Line Railroad Company ("Soo Line"). He seeks damages for injuries suffered by having been struck by lightning while working in a railroad tower. At trial, Mr. Walker sought to introduce expert testimony to establish that electrical injury could have been the cause of his condition. Much of that testimony was excluded by the district court on the ground that it lacked a scientific basis. The district court also refused to admit testimony

from an expert on electrical safety about how lightning could have penetrated the tower in which Mr. Walker was working. The district court allowed testimony from several Soo Line expert witnesses over Mr. Walker's objection. The jury returned a verdict for Soo Line. We conclude that several portions of the expert testimony excluded by the district court should have been admitted and that their exclusion severely curtailed Mr. Walker's ability to present his case. We therefore reverse the judgment of the district court and remand the case for a new trial.

I

BACKGROUND

In 1991 Richard Walker was employed by Soo Line as a tower operator. The job required him to direct railroad cars to particular tracks by operating switches in a control tower. On October 24, 1991, Mr. Walker was working the 11 p.m. to 7 a.m. shift at the Bensenville rail yard. He was stationed in Tower A, one of two 75-foot towers in the yard. There was an electrical storm in the area that night. Mr. Walker claims that, at around 3 a.m., he received injuries from a lightning bolt as he was touching switches on his control board. He relates that he experienced chest pain and that his body heated up. Mr. Walker was hospitalized for two days, but returned to work a few weeks later.

In 1995 Mr. Walker brought this action against Soo Line under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. ("FELA"). Initially, he claimed that the lightning strike had affected his hearing. Later, he amended his complaint to allege that the lightning strike had caused him psychological damage and had impaired his ability to work.

Mr. Walker was evaluated by the Electrical Trauma Research Program at the University of Chicago in December 1996. At trial, the district court excluded or limited the testimony of two expert witnesses from that program. One of these experts was Dr. Neil Pliskin, a psychologist who had examined Mr. Walker to determine his functional capability. Dr. Pliskin administered a battery of tests designed to test Mr. Walker's IQ, his concentration, and other functions. The district court permitted Dr. Pliskin to testify about the results of those tests; it did not permit, however, Dr. Pliskin's testimony about his evaluation of Mr. Walker's IQ before the incident or about any decline in his IQ since the incident. The district court excluded this evidence because Dr. Pliskin had not evaluated Mr. Walker before the incident and had relied on an erroneous account of Mr. Walker's educational history.

The leader of the University of Chicago team, Dr. Mary Capelli-Schellpfeffer, was not allowed to testify at all. Although there was no dispute about Dr. Capelli-Schellpfeffer's expertise on the subject of electrical trauma, the district court found that she improperly had relied on findings of other members of her team. Specifically, the court found that she had relied on Dr. Pliskin's findings about Mr. Walker's pre-injury functioning and excluded that testimony on the ground that it was based on an unreliable foundation. The district court also excluded as unreliable Dr. Capelli-Schellpfeffer's testimony that Mr. Walker was suffering from post-traumatic stress disorder because she was not a psychiatrist or psychologist and because her testimony conflicted with Dr. Pliskin's findings.

Mr. Walker also sought to introduce the testimony of Dr. Martin Uman, an expert on electrical safety and the

chairman of the Department of Electrical Engineering at the University of Florida. Dr. Uman would have testified about the different ways by which electricity from lightning could have penetrated Tower A even if the lightning had not struck the tower directly. The district court barred that testimony as too speculative. However, Dr. Uman was allowed to testify in plaintiff's rebuttal case about the grounding and safety of Tower A after one of Soo Line's witnesses, Frank Denbrock, a safety inspector for Soo Line, testified that he had inspected Tower A and had found that it was properly grounded.

Dr. Adrian Upton was allowed to testify for Soo Line that there was no evidence that Mr. Walker was injured by any electrical trauma in November 1991. The district court also admitted records from Mr. Walker's treatment at the Madden State Hospital. Mr. Walker received psychiatric treatment there in 1972, 1973 and 1978.

II

DISCUSSION

We review the district court's evidentiary decisions, including decisions to admit medical expert testimony, for an abuse of discretion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, ___, 118 S. Ct. 512, 517 (1997); *United States v. Taylor*, 154 F.3d 675, 683 (7th Cir.), *cert. denied*, 119 S. Ct. 629 (1998). In deciding whether to admit the proffered expert testimony, a district court must be guided by the instructions of *Daubert*. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Specifically, a district court is required to determine (1) whether the expert would testify to valid scientific knowledge, and (2) whether that testimony would assist the trier of fact with a fact at issue. *See id.* at 592-93. We shall consider

the district court's decision with respect to the testimony of each witness as well as its decision to admit the hospital records.

A. Dr. Neil Pliskin

Dr. Pliskin's qualifications as a professional psychologist are not in dispute. He was allowed to testify about Mr. Walker's post-incident IQ. To establish that IQ, Dr. Pliskin administered to Mr. Walker a battery of tests.

The district court refused, however, to allow testimony by Dr. Pliskin about Mr. Walker's functioning prior to the incident. Dr. Pliskin acknowledged in his deposition that he relied in part on Mr. Walker's educational history in determining his pre-incident IQ. Parts of Mr. Walker's history, apparently including his educational history, had been reported to Dr. Pliskin by a woman named Vanessa Harris, described by the district court as Mr. Walker's girlfriend. The parties do not appear to dispute that her statements to Dr. Pliskin were made on behalf of Mr. Walker. The district court found, however, that the educational history on which Dr. Pliskin relied was inaccurate. Dr. Pliskin, according to the court, acknowledged that, if the account of Mr. Walker's educational history related to him by Harris was inaccurate, that inaccuracy would have affected his opinion on Mr. Walker's pre-incident IQ. The court also found that Dr. Pliskin was unsure whether electrical trauma would cause the drop in IQ he claimed to have found and that there were many other factors in Mr. Walker's life that might have caused his reduction in functioning.

Under *Daubert*, the first inquiry that must be undertaken is whether Dr. Pliskin relied upon a proper scientific methodology to determine Mr. Walker's pre-incident

IQ. The record establishes that Dr. Pliskin's evaluation relied on the medical, educational and professional histories reported by Mr. Walker and Harris, and on his administration of the National Adult Reading Test, a test specifically designed to estimate a person's IQ before that person suffered a trauma. Medical professionals reasonably may be expected to rely on self-reported patient histories. *See Cooper v. Carl A. Nelson & Co.*, Nos. 98-4169, 98-4222, 2000 WL 257140, at *11 (7th Cir. Mar. 7, 2000). Such histories provide information upon which physicians may, and at times must, rely in their diagnostic work. Of course, it is certainly possible that self-reported histories may be inaccurate. Dr. Pliskin himself said that it was not unusual for patients to misrepresent their histories to him. In situations in which a medical expert has relied upon a patient's self-reported history and that history is found to be inaccurate, district courts usually should allow those inaccuracies in that history to be explored through cross-examination. The Supreme Court in *Daubert* explained that the factual underpinnings of expert testimony may be subject to counter-attack. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); *see also Cooper*, 2000 WL 257140, at *11 (quoting *Daubert*). In this case, Soo Line appropriately could have presented evidence that Dr. Pliskin had relied upon an inaccurate history and thereby called his conclusions into question. "[T]he accuracy and truthfulness of the underlying [educational] history is subject to meaningful exploration on cross-examination and ultimately to jury evaluation." *Cooper*, 2000 WL 257140, at *11. Based on such evidence, a jury reasonably might

have chosen not to credit Dr. Pliskin's testimony. Evidence demonstrating that other events in Mr. Walker's life affected his functioning might have led a jury to conclude that, even if Mr. Walker's IQ had dropped after the incident, that decrease was not due to any electrical trauma. On the other hand, the jury might have been convinced that, evaluating Dr. Pliskin's testimony in its entirety, his conclusions remained sound despite the defects in the patient history. The critical point is that Dr. Pliskin employed a proper methodology to determine Mr. Walker's pre-incident IQ. It was appropriate for Dr. Pliskin to rely on the test that he administered and upon the sources of information which he employed.[1]

Having determined that Dr. Pliskin's testimony was based on an acceptable methodology, we must consider whether it would have assisted the jury with a fact at issue. Soo Line argues that Dr. Pliskin's testimony should have been excluded because he does not state definitively that the electrical trauma caused the drop in Mr. Walker's IQ. Under FELA, causation is a jury question. *See Scaggs v. Consolidated Rail Corp.*, 6 F.3d 1290, 1293-94 (7th Cir. 1993). From Dr. Pliskin's testimony, the jury could choose to infer that any electrical trauma Mr. Walker suffered caused his decline in IQ. Dr. Pliskin is not required to have an opinion on that ultimate question

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[1] Mr. Walker also contends that the district court should have allowed Dr. Pliskin to testify about Mr. Walker's pre-incident IQ because Soo Line opened the door to this topic in its cross-examination of Dr. Pliskin. Because we hold that Dr. Pliskin's testimony should have been allowed as part of Mr. Walker's case-in-chief, we need not address this argument.

to be permitted to testify.[2] His testimony could assist the trier of fact even if he cannot say with complete certainty that electrical trauma caused Mr. Walker's decline in functioning.

The district court expressed concern that the jury would not be "sophisticated enough to understand the cross-examination, the attempts by the defendant to bring out that Dr. Pliskin's opinion is really not as sound as he would give it on direct examination." The Supreme Court, however, has expressed its confidence in the ability of juries to understand complicated material, and we believe the district court should have allowed the jury to consider Dr. Pliskin's evidence in this case. *See Daubert*, 509 at 595-96 (acknowledging a party's concern about "a 'free-for-all' in which befuddled juries are confounded by absurd and irrational pseudoscientific assertions" but finding those concerns "overly pessimistic about the capabilities of the jury and of the adversary system generally").[3]

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[2] Historically, witnesses were expressly prohibited from testifying about the ultimate issues facing the jury. *See* Fed. R. Evid. 704 advisory committee's note. That prohibition was eliminated in the federal courts by Federal Rule of Evidence 704, which allows such testimony (subject to an exception in criminal cases not relevant here). *See* Fed. R. Evid. 704; *United States v. Baskes*, 649 F.2d 471, 479 (7th Cir. 1980). Nothing in that rule, or any other rule governing expert testimony, *requires* an expert to opine on the ultimate issue in order to have his testimony admitted.

[3] There may be cases in which a patient's self-reported history is so patently misleading as to make it unreasonable for an examining physician to place any reliance on it. On this record, however, it is clear that we have no such case before us. Dr. Pliskin's testimony should not have been excluded under

(continued...)

Of course, as *Daubert* made clear, the trial court must also keep in mind the other rules regarding the admissibility of evidence. *See Daubert*, 509 U.S. at 595. On this record, we cannot discern any independent reliance on the part of the district court on any other rule.

B. Dr. Mary Capelli-Schellpfeffer

The district court refused to allow any testimony by Dr. Mary Capelli-Schellpfeffer, the head of the clinical team at the University of Chicago that examined and evaluated Mr. Walker. Dr. Capelli-Schellpfeffer concluded, based on a significant extent on her discussions with members of the team, that Mr. Walker had post-traumatic stress disorder and had lost function because of an electrical injury. She was also prepared to testify that it was not unusual for electrical injuries to first manifest themselves long after the electrical trauma that caused them, as Mr. Walker argued his did. The district court determined that Dr. Capelli-Schellpfeffer was not qualified to testify about post-traumatic stress disorder because she was not qualified as a psychiatrist or psychologist. It acknowledged that she was qualified to testify about the effect of electrical trauma on the human body, but still barred her testimony in its entirety.

Although the district court's statement of its reasons for excluding Dr. Capelli-Schellpfeffer's testimony are not stated with optimal clarity, it is clear that the wholesale disallowance of this testimony was not an acceptable exercise of discretion. At the outset, we think that it was

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(...continued)
Daubert solely on the ground that his patient's self-reported history contained some inaccuracies.

proper for a physician working in the role that Dr. Capelli-Schellpfeffer held on the diagnostic and evaluation team to rely on the work of her team members in forming her opinion. Medical professionals have long been expected to rely on the opinions of other medical professionals in forming their opinions. *See Birdsell v. United States*, 346 F.2d 775, 779-80 (5th Cir. 1965) ("With the increased division of labor in modern medicine, the physician making a diagnosis must necessarily rely on many observations and tests performed by others and recorded by them . . . ."); *see also Durflinger v. Artiles*, 727 F.2d 888, 892-93 (10th Cir. 1984); *Jenkins v. United States*, 307 F.2d 637, 641-42 (D.C. Cir. 1962); *Boehme v. Maxwell*, 309 F. Supp. 1106, 1110 (W.D. Wash. 1968) (quoting *Birdsell*). Federal Rule of Evidence 703, the rule governing the appropriate bases of expert testimony, specifically contemplates, in its advisory committee notes, reliance on "reports and opinions from nurses, technicians and other doctors." Fed. R. Evid. 703; *see also Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142 (9th Cir. 1997) (citing Rule 703). Indeed, courts frequently have pointed to an expert's reliance on the reports of others as an indication that their testimony is reliable.[4] Expert testimony relying on the opinions of others should, of course, be rejected if the testifying expert's opinion is too speculative, *see Washington v. Armstrong World Indus.*, 839 F.2d 1121, 1123-24 (5th Cir.

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[4] *See, e.g., Hose v. Chicago Northwestern Transp. Co.* 70 F.3d 968, 974 (8th Cir. 1995); *United States v. Lawson*, 653 F.2d 299, 301-02 (7th Cir. 1981); *Antoine-Tubbs v. Local 513, Air Transp. Div.*, 50 F. Supp.2d 601, 609 (N.D. Tex. 1998) (citing *Moore v. Ashland Chem, Inc.*, 126 F.3d 679, 690-91 (5th Cir. 1997), *rev'd en banc*, 151 F.3d 269 (5th Cir. 1998) *and cert. denied*, 119 S. Ct. 1454 (1999)), *aff'd*, 190 F.3d 537 (5th Cir. 1998); *Gess v. United States*, 991 F. Supp. 1332, 1338 (M.D. Ala. 1997).

1988), or the underlying basis is faulty, *see National Bank of Commerce v. Dow Chem. Co.*, 965 F. Supp. 1490, 1523-24 (E.D. Ark. 1996), *aff'd*, 133 F.3d 1132 (8th Cir. 1998) (per curiam).

Soo Line argues that Dr. Capelli-Schellpfeffer's opinion that Mr. Walker suffered from post-traumatic stress disorder is unreliable because she relies primarily on Dr. Pliskin's work, and Dr. Pliskin concluded that Mr. Walker did not have post-traumatic stress disorder. That two different experts reach opposing conclusions from the same information does not render their opinions inadmissible. *See Allapattah Servs., Inc. v. Exxon Corp.*, 61 F. Supp.2d 1335, 1341 (S.D. Fla. 1999) ("Merely because two qualified experts reach directly opposite conclusions using similar, if not identical, data bases . . . does not necessarily mean that, under *Daubert*, one opinion is *per se* unreliable."). Moreover, Dr. Capelli-Schellpfeffer also relied on the information of other professionals who examined Mr. Walker, including psychiatrist, Dr. Kelly. This additional information, coupled with her own limited examination of Mr. Walker, reasonably could have led her to come to a conclusion different from Dr. Pliskin's. To the degree that she might have relied on faulty information, the matter certainly could be explored on cross-examination.

Nor do we believe that the leader of a clinical medical team must be qualified as an expert in every individual discipline encompassed by the team in order to testify as to the team's conclusions. The team approach to medical diagnosis and treatment is employed to ensure that all relevant disciplines work together for the good of the patient. The leader of that team is chosen because of her ability to assess accurately the role that each member of the team ought to play and to reconcile, when necessary,

competing perspectives. In short, the expertise of the team leader is the capability to evaluate, in light of the overall picture, the contributions of each member of the team. Here, the district court found Dr. Capelli-Schellpfeffer to be an expert on the subject of whether electrical injuries could cause post-traumatic stress disorder. Dr. Capelli-Schellpfeffer is not a psychiatrist and well might not be able to render an opinion about diagnosing post-traumatic stress disorder on the basis of something other than electrical trauma. However, as the leader of a clinical team specializing in electrical injury, who reasonably relied on the expert opinions of specialists who also examined Mr. Walker, her conclusion that Mr. Walker suffered from post-traumatic stress disorder was a professional opinion that the jury had the right to consider.

C. Dr. Martin Uman

Dr. Martin Uman, the chairman of the electrical engineering department at the University of Florida, testified in his deposition about different ways that lightning could have penetrated Tower A. Starting with the assumption that lightning could have hit in any one of several places in the rail yard, Dr. Uman offered testimony of how, from those several places, electricity could have penetrated Tower A. Dr. Uman said that Mr. Walker could have been injured through a direct hit to Tower A, through a hit to the light tower near Tower A, or through a hit to wires in the yard connected to a switch on Mr. Walker's control board, if Mr. Walker happened to be touching that switch at the time. He also acknowledged that it was possible that lightning could have hit the yard without injuring Mr. Walker in any way. The district court allowed only those portions of Dr. Uman's testimony that addressed the possible dangers if

the tower had been struck directly by lightning; that testimony was only allowed in Mr. Walker's rebuttal case to contradict the testimony of Soo Line expert Frank Denbrock.

We must conclude that the district court's decision in restricting Dr. Uman's testimony cannot stand even under the deferential standard of review. Experts are allowed to posit alternate models to explain their conclusion. *See Cole v. Control Data Corp.*, 947 F.2d 313, 319 (8th Cir. 1991) (permitting testimony about alternate models for calculating damages); *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 558-59 (8th Cir. 1990) (allowing expert to testify about eight different damages models). The jury would have been assisted by learning different ways that lightning could have penetrated the tower.

This testimony could have been helpful even though Dr. Uman cannot say with any certainty where exactly lightning hit the rail yard, if it hit the rail yard at all. Dr. Uman intended to explain to the jury the ramifications of lightning striking a different point in the yard; the jury, based on eyewitness testimony and on any meteorological evidence entered by the parties, could decide whether it thought lightning had in fact hit anywhere in the yard. The questions of whether lightning hit the yard, and if so where, were questions of fact. *See Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388, 390 (5th Cir. 1961) (lightning striking clock tower); *Hartford Fire Ins. Co. v. Thompson*, 175 F.2d 10 (8th Cir. 1949) (lightning striking cattle). Such questions are for the jury. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 373 (1995); *Robinson v. Burlington Northern R.R. Co.*, 131 F.3d 648, 653 (7th Cir. 1997). Soo Line, through evidence of its own, could have attempted to show that lightning did not

strike any of the vulnerable points identified by Dr. Uman. It also could have presented testimony contradicting Dr. Uman's assertions that lightning striking various points in the rail yard could have affected someone working in Tower A. The jury then could have decided whether it thought lightning struck the yard and, if it concluded that lightning did strike, could have determined whether that lightning injured Mr. Walker. Dr. Uman had scientifically valid testimony that would have assisted the jury with its inquiry, and—assuming the testimony was in conformity with the other Federal Rules of Evidence—the district court should have allowed him to present that testimony to the jury.

D. Frank Denbrock

Frank Denbrock, an electrical engineer who has extensive experience in the field of electrical safety, inspected the rail yard in 1997. He testified for Soo Line, over Mr. Walker's objection about the safety of Tower A. Expert testimony from technical fields is governed by the same concerns and criteria as the admission of medical expert testimony. *See Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1174-76 (1999). The district court admitted Denbrock's testimony.

Mr. Walker contends that the district court conducted an inadequate *Daubert* hearing before choosing to admit Denbrock's testimony. We review de novo "whether the district court properly followed the framework set forth in *Daubert*." *United States v. Hall*, 165 F.3d 1095, 1101 (7th Cir.), *cert. denied*, 119 S. Ct. 2381 (1999). "Upon a determination that the district court properly applied the *Daubert* framework, the district court's decision to admit or exclude expert testimony is reviewed only for an abuse

of discretion." *Id.* The discussion of Denbrock's qualifications took place in the context of a discussion about the qualifications of several witnesses. It is true that the district court did not articulate explicitly Denbrock's experience in terms of the *Daubert* factors, but the district court's consideration of the question was not so inadequate as to render it faulty as a matter of law. When issuing oral rulings on *Daubert* standard as though it were some magical incantation." *See Ancho v. Pentek Corp.*, 157 F.3d 512, 518 (7th Cir. 1998).

On the factual issue of Denbrock's qualifications, the district court did not abuse its discretion by admitting Denbrock's testimony. Mr. Walker argues that Denbrock's testimony should have been excluded because his inspection was inadequate and his conclusions were faulty. Mr. Walker is correct that shoddy preparation by an expert might evidence a lack of professional qualifications on the part of a proffered witness. *See Ancho*, 157 F.3d at 516-19. We are not prepared to say, however, that the district court's decision to admit Denbrock's testimony was an abuse of discretion. Denbrock was offered as an expert on the basis of his work for a power company, where he was responsible for ensuring the safety of its facilities from lightning. Denbrock demonstrated professional experience in the area of electrical safety, and Rule 702 specifically contemplates the admission of testimony by experts whose knowledge is based on experience. *See Kumho Tire*, 119 S. Ct. at 1174; *Hall*, 165 F.3d at 1101. Although the district court did not discuss Denbrock's personal knowledge of the site in question at the *Daubert* hearing, Denbrock testified at trial that he personally had inspected the tower. If there was evidence that Tower A was unsafe that Denbrock should have considered but did not, or if there was reason to believe that Denbrock's investigation was shoddy,

Mr. Walker could have uncovered those flaws through cross-examination and through the presentation of contrary evidence. Here Denbrock provided a sufficient showing of his expertise. The district court did not abuse its discretion by allowing Denbrock's testimony.

E. Dr. Adrian Upton

Dr. Adrian Upton is a medical expert witness who testified for Soo Line. He testified about Mr. Walker's medical condition after reviewing Mr. Walker's medical records. Mr. Walker argues that Dr. Upton was not qualified to testify on the subject because he did not have sufficient experience in trauma caused by lightning and personally had not examined Mr. Walker.

Dr. Upton's specialty is the effect of electric current on the human body. There is no dispute as to his medical qualifications. In allowing Dr. Upton to testify, the district court relied upon Dr. Upton's experience in treating patients with electrical injuries and upon Dr. Upton's examination of Mr. Walker's medical records. These factors were a sufficient basis for the district court to find Dr. Upton qualified as an expert witness. The lack of an examination of Mr. Walker does not render Dr. Upton's testimony inadmissible. *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 762 (3rd Cir. 1994) ("[W]e think that evaluation of the patient's medical records, like performance of a physical examination, is a reliable method of concluding that a patient is ill even in the absence of a physical examination."). Indeed, we have said that the examination of medical records can be an important part of an expert witness' preparation. *See O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1107 (7th Cir. 1994). The district court did not abuse its discretion by admitting Dr. Upton's testimony.

F. The Madden State Hospital Records

The district court allowed Soo Line to introduce into evidence Mr. Walker's records from Madden State Hospital. Soo Line quoted from the records during closing argument. Mr. Walker was a patient on three occasions: in 1972, 1973 and 1978. The portion of the record quoted by Soo Line during closing argument noted that Mr. Walker was admitted in 1972 for six weeks of treatment, and then again in 1978. Mr. Walker argues that the records should not have been admitted because his hospitalization occurred so long before the events at the rail yard that they could not be relevant to his condition at that time. Nonetheless, Dr. Pliskin, a witness for Mr. Walker, acknowledged at trial that he would have liked to have known about Mr. Walker's hospital stay when preparing his evaluation of Mr. Walker's pre-incident abilities. On this record, we see no reason to disturb the decision of the district court.

G. Harmless Error

Soo Line also submits that any error by the district court in the admission of evidence is harmless. We shall vacate a jury verdict only if error substantially influenced the jury. *See Palmquist v. Selvik*, 111 F.3d 1332, 1339 (7th Cir. 1997); *Groom v. Days Inn*, 62 F.3d 204, 208 (7th Cir. 1995). Here, the excluded testimony from Dr. Pliskin, Dr. Capelli-Schellpfeffer, and Dr. Uman formed a substantial portion of Mr. Walker's case. Our examination of the record convinces us that the exclusion of their testimony was not harmless error.

Conclusion

For the foregoing reasons, the jury verdict is reversed, and the case is remanded for further proceedings consistent with this option.

REVERSED and REMANDED

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

May 31, 2000

Before

Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge

No. 98-4237

RICHARD WALKER,

Plaintiff-Appellant,

v.

SOO LINE RAILROAD COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 3861—**Arlander Keys**, *Magistrate Judge*.

ORDER

Upon consideration of the Defendant-Appellee's petition for rehearing filed on April 14, 2000, the judges on the panel have voted to deny the petition. Accordingly,

It is ORDERED that the petition for rehearing is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 93 C 3861 Date: November 13, 1998

Name of Magistrate Judge: Arlander Keys

Case Title: Walker v. Soo Line

* * * * *

DOCKET ENTRY:

* * * * *

(10) ☒ [Other docket entry] Plaintiffs' Motions in Limine (60-1), (61-1), (62-1), (63-1), (64-1), (65-1), (66-1), (67-1), (68-1), (70-1) are granted in part and denied as stated in open court. Defendant's Daubert Motion in Limine (71-1) and Non-Daubert Motions (72-1) are granted in part and denied in part as stated in open court.

* * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS (Chicago)

RICHARD WALKER,	)	
	)	
Plaintiff,	)	
v.	)	Docket No. 93-CV-3861
	)	
	)	
SOO LINE RAILROAD	)	
COMPANY,	)	Chicago, Illinois
	)	November 16, 1998
Defendant.	)	

HEARING ON MOTIONS (Continued)
BEFORE THE HONORABLE
MAGISTRATE JUDGE ARLANDER KEYS

APPEARANCES:

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

MR. CONNELLY: Good morning, Judge.

MR. O'DONAGHUE: Good morning, your Honor.

THE CLERK: 93-C-3861, Walker vs. Soo Line.

THE COURT: Good morning, gentlemen.

MR. CONNELLY: Good morning, Judge, Matthew Connelly and Tom Tobin on behalf of the defendant, Soo Line Railroad.

THE COURT: Good morning, Mr. Connelly.

MR. PEAVEY: Mark Peavey and William O'Donaghue on behalf of the plaintiff, Richard Walker.

THE COURT: Good morning, Mr. Peavey and Mr. O'Donaghue, and Mr. Tobin.

MR. TOBIN: Yes. Say your full name for the record.

MR. TOBIN: Thomas F. Tobin.

THE COURT: And you're for the defendant.

MR. TOBIN: Correct.

THE COURT: Well, I have spent about 16 hours over the weekend and this morning reading through all of these motions, and I have read every page of every deposition.

I have read all of the briefs in support of and the briefs in opposition to the motions. And I'll tell you, it's not—While I'm one who believes in allowing the parties to present their evidence if it's reliable evidence, I also am—Certainly in jury trials, if this were a bench trial I'd just throw everything in and I'd sort it out myself, but this is not a bench trial—I'm concerned with juries being misled by certain testimony by virtue of the fact that certain individuals who are qualified in some extent to give expert testimony is giving testimony that could certainly lead the jurors to give more weight to it than it is entitled to based on what I know of from reading the deposition of the—and reports—of the proffered experts. And that gives me certainly some problems with whether to allow certain testimony. We'll start with the testimony, the proffered testimony of Dr. Pliskin. Now Dr. Pliskin, he indicates that he relied on that—I'm really concerned with his findings concerning the pre-morbid and post-occurrence IQ of the plaintiff. He claims that he believes it was around 90 prior to the incident, and that it's around 80, full scale IQ of around 80 after the incident. First of all, I don't know whether it's a mistake by or whether it's even germane to the issue here, but all of the people who examined and had opinions about the mental problems of the plaintiff started out with the erroneous assumption that this incident took place a year later than it actually did. Now whether that is important here, he claims this is September of 1992 whereas the incident was in October of 1991. Nobody saw this guy until six years after, rather than five years after the fact. It was actually about six years, I believe, after the fact before anyone examined him. So I—That's the first thing I noticed, is that he's recalling this incident and it's in these treatment notes it's set forth as September 25th of 1992. Secondly, Dr. Pliskin admits that if there were sig-

nificant deviations from the prior—as to the plaintiff's mental treatment or—and his educational background, that would have some impact, could have an impact on his opinion. Now he, from what I can see, he relied basically on Vanessa Harris' recitation as to the plaintiff's educational background, including his grades in high school and in college. Well, I looked at his grades in high school and college and the only thing he passed apparently in college were his music courses. And he got a D, four F's and a withdrawal on the other courses. He also indicated a two-year college matriculation at Alcorn State, I believe. I think he only had one year. And those years were he had A's. Sure he had A's. He had an A in tuba. He had an A in band, and then he had a C in military science. He had F's in world civilization and general biology, piano, and introduction to music. He withdrew from physical ed activities and he got D's in singing and ear—whatever the sight—singing and ear and student adjustment. And I think that's the only year that he was there. Am I correct on that?

MR. TOBIN: I think it's—

THE COURT: That's all we have here. Well—

MR. TOBIN: I think it's a semester.

THE COURT: He—It was one semester?

MR. TOBIN: I believe so.

THE COURT: He represented, or at least Ms. Harris represented that he had two years of college. Malcolm X says they didn't have—they have no record that he ever attended there. Ms. Harris also indicated that he was an A student, I believe, well, he was a good student in high school. Well, I don't know how she knew that because if you look at his grades in high school, it was certainly wasn't very good. He had a few C's. Well, he had C's and

C-plus, B-plus, D's, C-plus. I don't see an A anywhere in his high school record here. So he wasn't a very good student in high school. Well, in order to arrive at his pre-morbid IQ functional, Dr. Pliskin indicated he factored his education, how well he did in school, his past work performance and all into the other examinations he gave him, which were the Trailmaking MCI, Wexler Revised Intelligence Test, and all, and he had that NAP-something, NAR, whatever it is, that four-letter test that he gave and it came out with an IQ of prior to the incident. He then admits that he really doesn't know whether—if, in fact, the lightning did strike Mr. Walker, that that would have decreased his IQ, especially by the number of ten points that he suffered apparently from his alleged pre-morbid performance. But then he also opines, though, that there was no post-traumatic stress syndrome. He indicated that depression, if in fact the plaintiff had been depressed, could have an adverse impact on his current IQ readings. Well, the record shows that the plaintiff had a lot of things that happened to him in his family life, and no job and this could have affected him, could have caused depression which could also have lowered his current functioning level, and there's just so many questions here as to—I have no question or no doubt that Dr. Pliskin's examination, his battery of examinations that he gave us probably a true reading as to his current functioning. Now whether that represents a significant decrease from prior to 1991 is anybody's guess. I don't think that Dr. Pliskin could make that based on the many questions that remain regarding his function prior to this alleged incident. Now do you want—the plaintiff's counsel, do you want to respond to that?

MR. O'DONAGHUE: Well, Judge, I'm not real sure what you're doing. Daubert requires you to find if there's a scientific basis for the expert's opinion, i.e., that gives it

its reliability and whether it's helpful to the jury. If you say that Dr. Pliskin's examinations give you a true view of Mr. Walker's current—

THE COURT: Current.

MR. O'DONAGHUE: —condition, I think that probably rules on the scientific basis of his testimony.

THE COURT: As to his current function.

MR. O'DONAGHUE: As to his current function. As to the causation, that's probably an outline of the defendant's cross-examination of Dr. Pliskin: Well, what about this? What about this? Does this effect your opinion? et cetera, et cetera, et cetera. I'm really not sure what the Court is saying here. The Court is saying what the Court doesn't like about all this testimony, and—

THE COURT: What I'm saying—

MR. O'DONAGHUE: —I'm glad this isn't a bench trial.

THE COURT: What I'm saying is that this is—that the Court, in its gatekeeping function, has to look at the fact that we have jurors sitting out here who have no—who don't know all these things about the things that were factored into—the shortcomings that I see that were factored into his opinion that—Basically what his opinion is is that—and I believe that this is what you want him to testify to, that yes, if in fact he was hit by a bolt of lightning and I believe him because he told me, then his loss of mental function and/or a loss of IQ was proximately caused by this bolt of lightning. That's what you want to show. And as a result of that, his current functioning is that he can't work and that that's, therefore, for the foreseeable future, he should be compensated for that. That's what you want him to testify to. But what I'm saying is that based on the problems that—He's ac-

knowledged that if, in fact, what the plaintiff told him, the plaintiff and his girlfriend told him is not accurate, or significantly, if it's not substantially true, then that could affect his opinion as to what his pre-morbid functions were. And that's what you want to do. You want the jury to—First you want to show the jury that this guy is so qualified that he's, that whatever he says is more than likely they should accept it as gospel, and then have him say it. Well, you're not going to—I know what your thinking is: Well, maybe perhaps leave it up to the defendants to cross-examine him in these areas. Well, I don't know that jurors are going to be sophisticated enough to understand the cross-examination, the attempts by the defendant to bring out that Dr. Pliskin's opinion is really not as sound as he would give it on direct examination, and that's what my concern is. And you know, not only that, sometimes in attempts to cross-examine an expert witness, the cross-examiner can give the impression that they're being overly hostile towards this guy and this guy is a great guy and you're trying to show that he's a bad guy, and it's just not warranted, that kind of badgering. And I just, again, this is a jury trial that I'm concerned that the jury will be misled by the attempts to bring out the really shortcomings I see in the examination and report of Dr. Pliskin. Any more comment on that?

MR. O'DONAGHUE: Judge, I think you're, you know, as we said on our response, all of the points you have raised are the exact points the defendant's counsel has raised, and it all goes to weight and sufficiency. I mean you yourself admitted Dr. Pliskin is eminently qualified. He conducted a standard psychological evaluation of Mr. Walker, giving him 15 standardized tests. All those tests have built into them factors for malingering, factors to determine exactly where the person is. Now the problem with the defendant's argument is they're raising these

nitpicking—and I call them nitpicking because they're trying to punch little holes here and there—they have yet to say that any of the assumptions were wrong. The jury is not just going to hear from Dr. Pliskin. He's not going to testify in a vacuum. They're going to hear from Mr. Walker. They're going to hear from Vanessa Harris. And what Mr. Walker is going to testify about college was no, he wasn't a good student, a classic A student. But it wasn't because he didn't have the capabilities. It was because he was managing a rhythm and blues band and didn't go to class a lot. Music was the most important thing in his life then and that's what he did. They didn't ask him about that. They never asked Mr. Walker about that. They never—They got the records and they could have brought Mr. Walker back in and asked him about those records. They didn't. They could have asked Dr. Pliskin about the records. They didn't. In addition to which Dr. Pliskin is going to testify about studies that he himself has done on victims of electrical trauma injuries and that the symptoms that Mr. Walker is exhibiting are very consistent with someone who has been hit by lightning or received an electrical charge through his body. The third thing is—

THE COURT: Okay, right there, I have no problem with that. You want him to testify to that and not get into his pre-morbid functioning and post-morbid?

MR. O'DONAGHUE: In terms of the pre-morbid functioning, Judge, there's other things Dr. Pliskin relied on. The thing he most relied on, and which—and maybe it's not completely clear in his deposition—is the fact that Mr. Walker, from 1978 until 1991, worked at a highly skilled job that required complicated tasks and juggling many different pieces of information at the same time. All of those things were considered. You can't just point

and say, well, he got a D in high school in science. Therefore his IQ was less than—was about what it is now. Grades are not the only thing indicative of IQ, your Honor. Grades only indicative of the school he went to and how he applied himself. It doesn't—You know—

THE COURT: But doesn't—

MR. O'DONAGHUE: I think the jury—

THE COURT: Does he say—

MR. O'DONAGHUE: —is going to understand that.

THE COURT: But doesn't he say himself, though, Dr. Pliskin, that he assumes that this guy who went to two years of college, that he wasn't the greatest student and that he—He does say that.

MR. O'DONAGHUE: He assumed that, so how is that wrong?

THE COURT: But—No.

MR. O'DONAGHUE: How is that assumption wrong?

THE COURT: He only went to school—He only went for one semester.

MR. O'DONAGHUE: He—

THE COURT: And he got four F's, a D, and a withdrawal and C.

MR. O'DONAGHUE: Well, Judge, I wouldn't want to put my law school record before you. (Laughter.) But my next Daubert motion—Judge, you know, as an example, I went to law school at night and worked two jobs. If you looked at some of my grades you'd say this guy isn't—

MR. TOBIN: Oh, please.

MR. O'DONAGHUE: —very bright.

MR. TOBIN: What an argument. Come on.

MR. O'DONAGHUE: Excuse me, Mr. Tobin. I think I can finish.

THE COURT: But you didn't flunk, though.

MR. TOBIN: Well—

MR. O'DONAGHUE: Judge, my point is this. Dr. Pliskin did not assume that Mr. Walker went to the University of Michigan for two years. He assumed that he attended—and that's all Dr. Pliskin says is attended—a college for two years and was not on a track to graduate. That's what he says.

THE COURT: Okay, I read that.

MR. O'DONAGHUE: Okay? He also includes in that two years Malcolm X. Now—

THE COURT: Which he didn't attend.

MR. O'DONAGHUE: He attended a music workshop and was in the band that was part of Malcolm X. That's what he was. I'm not going to kid you and say he went there for academic courses. He didn't, all right? But there was no mis—Dr. Pliskin did not sit there and say prior to the injury Mr. Walker was a genius and Mr. Walker was an A student. He did not do that. He focused on, primarily—and this is what he'll testify to—the 13 years that he worked as a tower operator in a complicated skilled job, that that showed to Dr. Pliskin that he had sufficient intellectual capabilities to perform that job, and his testing shows that today he does not have those capabilities. So I think the jury can understand this.

THE COURT: Well, I don't have a problem with him testifying that he's tested people in the past and so forth, and that this is consistent now with those kinds of in-

juries. But when you say that what you're going to try to show, though, is that prior to the lightning hitting this guy that he had an IQ of 90. Since that time it's dropped to 80. And that the lightning bolt is the proximate cause of that declination.

MR. O'DONAGHUE: Judge, that's just one measure of his abilities. You know, the jury is going to hear from a coworker who describes Mr. Walker as being one of the best tower operators. The jury will be able to then—Mr. Walker is going to testify extensively. They will be able to see him. They're going to have detailed descriptions of what his job tasks were before the incident, and they're going to be able to look at this guy and determine whether he could do that job or not, whether or not Dr. Pliskin testifies about a decrease in his IQ or not. I mean if that's your major problem with Dr. Pliskin,—

THE COURT: That's the major problem. That is the major problem, him trying to—his attempt to quantify, to try to show that prior to the lightning striking, the alleged striking of the lightning, that Mr. Walker had an IQ of 90; since that time it's only 80. And now he can't—At 90 obviously he could do the job that he was performing. At 80 he can't. And that's the opinion.

MR. O'DONAGHUE: That's not the only—Judge, that's just one aspect of the opinion. That's not the major basis.

THE COURT: That's the aspect that I don't want—that I won't allow him to testify.

MR. O'DONAGHUE: Okay.

THE COURT: Okay?

MR. CONNELLY: Your Honor, if I'm clear, then the ruling is that Dr. Pliskin cannot give any testimony regarding any pre-morbid, post-morbid testing and any change in IQ as being—

THE COURT: Right.

MR. CONNELLY: —casually related to the lightning strike.

THE COURT: Exactly.

MR. PEAVEY: Judge, will he be able, though, to testify that based on his evaluation of Mr. Walker now that Mr. Walker cannot do the job that he was doing previous to the incident?

THE COURT: Well, I will allow that. He just testified—

MR. PEAVEY: All right, just so long as he doesn't go into IQ.

THE COURT: He just gave him that battery of tests and he's got an IQ, a full-scale IQ of 80 and if it is his opinion, based on that battery of tests, that he cannot go back to the kind of work, he cannot perform a job that he was performing back in 1991, he can testify to that. All right?

MR. TOBIN: Thank you.

THE COURT: Now you have Dr. Mary Capelli-Schellpfeffer.

MR. O'DONAGHUE: Schellpfeffer.

THE COURT: Schellpfeffer?

MR. O'DONAGHUE: Yes. She'll be here at one o'clock.

THE COURT: Well, she may or may not. (Laughter.) Because I don't see how she can—She came to the—She read Dr. Pliskin's report and she indicates—As I said, I read the entire deposition—she indicates that she relied on what Dr. Pliskin said about his pre-morbid and post-morbid functions. She relied on, I think she had a conversation with a Ms. Kelly, Dr. Kelly, was a Kelly?

MR. O'DONAGHUE: Yes.

MR. TOBIN: That's correct.

THE COURT: And she had—But her opinion was that he's suffering from post-traumatic stress syndrome. Well, even Dr. Pliskin said he wasn't suffering from post-traumatic stress syndrome, doesn't he?

MR. CONNELLY: That's right, Judge.

THE COURT: But she's relying on him. How can she testify to that? You're asking a jury to, because Dr. Mary Capelli Schellpfeffer is the doctor at the University of Chicago, you're asking the jury to assume that she knows what she's talking about here, but I know from reading the depositions and the reports that she gathered this from the report of Dr. Pliskin and to whom she sent him, and you know, I'm not—I'll hear your response to that.

MR. O'DONAGHUE: Judge, Dr. Capelli Schellpfeffer, and if I might shorten the transcript and refer to her as Dr. Mary.

THE COURT: Okay. Dr. Mary.

MR. O'DONAGHUE: That's how most people refer to her. Judge, she is the head of this program at the University of Chicago, the Electrical Trauma Research Program, which is a team of doctors. She heads the team. She did the initial physical examination of Mr. Walker.

THE COURT: Six years after the fact.

MR. O'DONAGHUE: Actually it was a little over five years.

THE COURT: All right.

MR. O'DONAGHUE: Okay. You know, you keep saying six. It's not six, it's five.

THE COURT: Well, 1991 to nineteen ninety—

MR. O'DONAGHUE: '96.

THE COURT: All right.

MR. O'DONAGHUE: It's December of '96 when she saw him. She then refers him to the different members of the team for evaluations along their specific specialties. She has a background in occupational medicine. That's essentially all she's done in her professional career. She has spent many years working with electrical trauma-injured patients, starting with her work at the Wisconsin Power Company where she dealt with them from the beginning to the end of their treatment, and then also at the Electrical Trauma Research Program.

THE COURT: I'll grant you that she would be qualified to testify normally in these trauma-type cases if she were relying on accurate information. She worked for the Wisconsin Power Company, I think it was, and—

MR. O'DONAGHUE: Correct.

THE COURT: —then she's been at U of C for quite some time.

MR. O'DONAGHUE: Correct.

THE COURT: And she's done a lot of studies. But what's her conclusion? Her conclusion here, though, counsel, is that the lightning struck the plaintiff and that the plaintiff now suffers from post-traumatic stress syndrome and that it is a proximate—that the lightning strike is a proximate cause of that; isn't that her opinion?

MR. O'DONAGHUE: That's her opinion, Judge.

THE COURT: How does she come to that? I don't see how she comes to it.

MR. O'DONAGHUE: She comes to that based on all the information she had. She had a conversation with Dr. Kelly, who is a psychiatrist. And Dr. Kelly told her that Mr. Walker was suffering from post-traumatic stress disorder—

THE COURT: Based on what Mr. Walker told Dr. Kelly.

MR. O'DONAGHUE: Based on her evaluation of Mr. Walker, which is what a psychiatrist does. Based on the fact that for two years after the accident he had nightmares every night, reliving the incident. That's what he told Dr. Kelly. Now—

THE COURT: But what did Dr. Pliskin, who actually conducted the objective evaluations that would have determined this? He says no, he doesn't have post-traumatic stress syndrome.

MR. O'DONAGHUE: Well, you know—

THE COURT: Doesn't he say that?

MR. O'DONAGHUE: There's varieties of post-traumatic stress disorder. Dr. Pliskin talks about adjustment disorder. That's similar to post-traumatic stress.

THE COURT: But if we can't understand it, how do you expect the jury to understand it, counsel?

MR. O'DONAGHUE: Judge, I think we can understand it, and I think the jury can understand it. And Dr. Schellpfeffer can—Dr. Mary can explain it in her testimony. And she can explain it based on not just the information she had but on her background knowledge on electrical trauma injuries, particularly that the length—just because his symptoms weren't apparent the day after he got hit by lightning, that they didn't start developing until six months later, that's incredibly consistent with people who receive these type of injuries, in that they can

develop slowly over time and then reach a peak, and that's what happened in 1995 when Mr. Walker stopped working. And since then, just because he didn't get the proper treatment or get properly evaluated by doctors who had no knowledge or background in electrical trauma injuries, that doesn't mean just because they saw him in 1996 that the opinion is not valid. The length of time is not that significant in this type of injury. And it's something that, you know, it goes to weight and sufficiency. It's something they can clearly argue to the jury. I think the jury can sit there and—The jury may sit there and say okay, I don't believe, this is too far removed from the accident. They may say that, but it's up to us to prove to them, to convince them through the testimony of Dr. Mary, that her opinion is valid, that it is based on the knowledge she had at the time and it was based on a complete evaluation of Mr. Walker.

THE COURT: Okay, Pages 60 and 61 of Dr. Capelli's, what is that? deposition, 60 and 61. Page 56 first (Pause.) Or is it 60 and 61? I had it marked.

MR. PEAVEY: 56 first or 61?

THE COURT: Make it 61. Start at Page 60.

Q "My question to you is how can anyone say that someone has had a decline in their mental functions if they don't know what their mental functions were before the incident?"

A "I defer your question to Dr. Pliskin, okay?"

Q "You won't answer or you can't answer?"

A "I defer your question to Dr. Pliskin."

Q "That isn't what I asked you. This is a deposition where you have to answer the questions, okay?" So bas-

ically her entire analysis here is based on what she learned from Dr. Pliskin's report.

MR. O'DONAGHUE: Judge, you've—

MR. TOBIN: I may add—

MR. O'DONAGHUE: —already knocked out one part of Dr. Pliskin's—

MR. TOBIN: No, no, wait a minute.

MR. O'DONAGHUE: —testimony.

MR. TOBIN: I may add one other essential thing. This is a Rule 26 witness. When they give opinions, they're limited to those opinions. Mr. O'Donaghue apparently thinks he's going to make up new opinions out of old cloth that we haven't previously seen. And she's limited to the opinion and the last opinion in almost the end of the deposition, I asked her point blank: Is your opinion based on anything other than the history and Dr. Pliskin's morbidity report? And she says no. So that is what her opinion is, based on that. She's a Rule 26 witness. We're entitled to have her restricted to the opinions that she gave.

MR. O'DONAGHUE: Judge, that's—Mr. Tobin's incorrect. She does not rely just on Dr. Pliskin. She—The question was, I think he's referring to Page 74 of the deposition where he asks:

Q "So the entire basis for the relation of the electrical injury is the history given by the patient and the psychiatric and psychological and physiological examinations that were given; is that right?"

A "Yes. And in addition, the temporal relationship between the reported injury event and the subsequent difficulties." All right? That's more than what Mr. Tobin

just said. She relied on everything she had before her, which is based on her knowledge. She relied on—She is very familiar with railroad jobs, Judge. She knows exactly what was required for Mr. Walker to do his task prior to 1991, and she can testify that based on the analysis that she has, he can't go back to that job.

THE COURT: Post-traumatic stress syndrome; that he's so preoccupied with his—

MR. O'DONAGHUE: He has worked—

THE COURT: —flashbacks and so forth that—

MR. TOBIN: The question—

THE COURT: —he can't work.

MR. O'DONAGHUE: No, that's not the only—

MR. TOBIN: The question—

MR. O'DONAGHUE: That's not the only diagnosis, Judge. He—

MR. TOBIN: The question before that, counsel—

MR. O'DONAGHUE: Mr. Tobin, may I finish?

MR. TOBIN: No.

THE COURT: Let—

MR. O'DONAGHUE: Let me finish.

THE COURT: Okay, let—Mr. O'Donaghue, go ahead.

MR. O'DONAGHUE: The diagnosis not just post-traumatic stress disorder, Judge. It's post-traumatic stress disorder with cognitive dysfunctions, memory problems, lack of concentration, serious memory problems to the point where he can't remember, you know, he'll walk out of a room and can't remember where he just came from, where he can't find his way to theaters that he traveled

to for 15 years before the accident, suddenly he can't drive there because he can't remember the way to go. Those are in addition to the post-traumatic stress disorder, all right? It's not just—It's that his brain cannot comprehend, cannot function in a manner for him to do the job that he used to be able to do. That's more than post-traumatic stress disorder.

MR. TOBIN: None of this is in the history she took. We went through the history that she took and all of this is something else. She said she relies on the history when she gave her deposition. We went through her history as to what she said, what was said to her. None of these things that he's now coming up with are included in it. She gives an opinion on it, and she's a Rule 26 witness. We're entitled to rely on that opinion. If they change the ground rules every time they decide they want to add something else, how do we ever get anything that's clear so that we know where we're going to try the case?

MR. O'DONAGHUE: Judge, I'm not adding any opinions that she hasn't already expressed. Her opinions are in her report. It's a four-page report. In the report are also the histories that she took and everything that she relied on, and everything I told you is everything that she relied on. There's nothing new here.

MR. PEAVEY: Judge, Page 56 of her dep: My judgment was that the symptoms that he was describing were consistent with the symptoms that a person who has post-traumatic stress disorder presentation might have.

THE COURT: Okay, that's her—Her opinion is different from that of Dr. Pliskin, who gave him the battery of tests.

MR. TOBIN: Correct.

MR. O'DONAGHUE: That's because she wasn't just relying on Dr. Pliskin, Judge. That's the whole point. She was relying on Dr. Kelly and she was relying on her own knowledge and her own evaluation and interview of Mr. Walker.

THE COURT: And do you want me to allow the jury to listen to her opinion about his post-traumatic stress syndrome?

MR. O'DONAGHUE: I want the jury to listen to all of her opinions, Judge, which includes that. And I think when they hear all of her opinions they'll be able to understand what's going on with Mr. Walker right now. That's what this trial is about.

THE COURT: No, I disagree. I'm going to bar the testimony of Dr. Mary as being unreliable, as under Daubert that doesn't meet the requirements of Daubert.

MR. O'DONAGHUE: Judge, are you ruling on Daubert based on her scientific expertise or on her knowledge and experience?

THE COURT: On her knowledge and experience on this particular—as it relates to this particular individual.

MR. O'DONAGHUE: Judge—

THE COURT: Dr. Capelli—Dr. Mary, she has indicated, her CV indicates that she has a wealth of experience and knowledge in particular areas. It certainly doesn't indicate—and she admits that she's not a psychiatrist or psychologist, but she's giving psychiatric opinions here. Wouldn't you agree that a post-traumatic stress syndrome would be under the rubric of psychiatric testimony here?

MR. O'DONAGHUE: No, I wouldn't agree with that completely, Judge.

THE COURT: And she says she doesn't have expertise in that area. She deals with brain trauma—No, not brain trauma, trauma from lightning.

MR. O'DONAGHUE: And other electrical sources.

THE COURT: Okay. Let me call—We're going to be here for awhile, I can see, because we still have two more to go. Well, we've dealt with Karbin already. I told you you can bring him in to rebut any inferences that there was no possibility that this lightning struck the plaintiff.

MR. O'DONAGHUE: Right.

THE COURT: If they say that, he says there's a 50-50 chance so that the jury can hear that.

MR. O'DONAGHUE: But Judge, what you said is that we can reserve him for rebuttal if we need him for rebuttal.

THE COURT: For rebuttal, right.

MR. O'DONAGHUE: Fine. That's fine.

THE COURT: But I want to call the other cases and get them out. We're going to be here for awhile, and then we can go to trial. Okay, go ahead.

(Interval while the Court heard unrelated cases.)

THE CLERK: 93-C-3861, Walker vs. Soo Line.

MR. O'DONAGHUE: Good morning again, your Honor, William O'Donaghue and Mark Peavey for the plaintiff.

THE COURT: Good morning, counsels.

MR. CONNELLY: Matt Connelly and Tom Tobin, Judge, for the defendants.

THE COURT: All right. Dr. Uman.

MR. O'DONAGHUE: Judge, can I just have a couple of final comments on Dr. Capelli?

THE COURT: Go ahead. Go ahead.

MR. O'DONAGHUE: I just want to make sure we're clear that you're saying Dr. Capelli can't testify to anything at all?

THE COURT: Well, she certainly—She indicates that—Well, tell me, what do you propose that she be able to testify to?

MR. O'DONAGHUE: Well, I'd prefer that she testify to all of her opinions. I just want to make sure we're clear on your decision as to what you're saying the problem with her testimony is and which parts of her testimony you have a problem with.

THE COURT: Okay, her testimony that the plaintiff suffers from a post-traumatic stress syndrome, and that his problems—that the lightning that allegedly hit him in 1991 were the proximate cause of his mental problems.

MR. O'DONAGHUE: Well, that's everything.

THE COURT: That's—

MR. O'DONAGHUE: That pretty much sums up what we were going to call her for.

MR. PEAVEY: Aside from her name. (Laughter.)

MR. CONNELLY: We're stipulate to her name.

MR. O'DONAGHUE: I mean she was also going to testify about the nature of electrical trauma injuries, but I don't know.

THE COURT: Well, the nature of—Well—

MR. O'DONAGHUE: To educate the jury. I mean it's not—We admit it's not a broken back case where there's going to be an X-ray that says here's the herniated disc. We plan on educating the jury, you know, to a certain point.

THE COURT: Okay. I read her introductory—She went on about 30, 40 pages just talking about how these things occur, and I was very impressed with it. She's—I don't qualm with her that these things that as electrical—she's not just talking about lightning. She's talking about any electrical—electrocution or whatever, that it causes these problems. Now she could testify to that.

MR. TOBIN: Your Honor, if she gets up and testifies to that, that leaves the jury to think that she's testifying for it on this case.

THE COURT: Well—

MR. TOBIN: And if you've barred her for the opinions in this case, it appears to me it's impossible to segregate it and say, well, she can testify, stand before the jury and the jury say well, but it doesn't apply to this case. This is just general background.

THE COURT: Well, no. I think if—Say, for instance, Mr. Barton and Mr. Walker testified, well, Barton is not going to testify, his testimony will indicate that there was lightning in the area and there was lightning right around at the time, so that's not going to be in dispute. But if the plaintiff testifies that he was struck by lightning and that he, as a result, he lost cognitive function or whatever, then I believe—she should be able to testify that generally the kinds of deficits that he claims could be—

MR. TOBIN: Then it's—

THE COURT: —or can result.

MR. TOBIN: Then it's speculative. That's the problem. And it's pure speculation as to the causal connection because she's saying generally this could be, but she's not saying it's on this one. And she can't say it's on this one, how can she get up and speculate that generally what he has could be? Because it could be is a speculation.

MR. CONNELLY: And she is an expert, not a treater, and that's—She'd be getting on the stand to put a bunch of information that Pliskin can say at the beginning part about how he treats these people too, but if you let her go on the stand and just say this is how electrical, you know, people are shocked, she has no opinion. All she did was act like an encyclopedia. And there's no opinion from the expert then.

THE COURT: Well, Mr. O'Donaghue?

MR. O'DONAGHUE: Judge, you're saying she can't testify to any opinions. If we use her just to educate the jury, I think that's appropriate. I mean that—

THE COURT: But the Pliskin—Won't Pliskin be able to do that?

MR. O'DONAGHUE: She actually probably has more—I'm trying to figure out how to phrase this.

MR. TOBIN: Be careful. (Laughter.)

MR. O'DONAGHUE: Dr. Pliskin can testify to similar matters, but—

MR. TOBIN: Then it's repetitious.

MR. O'DONAGHUE: Well, not until you hear it, but—You can't say it's cumulative until it's in. But I just want to—

THE COURT: I (inaudible) you got. I always hate to bar witnesses.

MR. O'DONAGHUE: Well then, don't. (Laughter.)

THE COURT: But sometimes you have to do it, and I'll tell you, I spent a lot of time over this weekend on these things trying to figure out—

MR. CONNELLY: We can tell.

THE COURT: —how can I possibly allow this witness to testify.

MR. O'DONAGHUE: But—

THE COURT: And trying to find a way to let them testify.

MR. O'DONAGHUE: Judge, one thing I'm not sure I'm clear on is it's okay for Dr. Pliskin to testify about his test results and about Mr. Walker's current condition and all that stuff, but yet it's not okay for Dr. Capelli to rely on that?

MR. TOBIN: It isn't what—

THE COURT: For Dr.—

MR. O'DONAGHUE: Rely on that report from Dr. Pliskin to support her opinions?

MR. TOBIN: That isn't what she relied on.

THE COURT: Only—No, because he's going to only be able to testify that based on his testing, his current testing, that battery of tests that he gave, that this person has an IQ of 80; that he cannot, with that IQ and the rest of the tests that he gave him, that it is his opinion that he can't return to the—he can't do that railroad job.

MR. O'DONAGHUE: You're saying that he cannot, based on his knowledge of electrical trauma injuries, say that his condition is consistent with someone who has suffered an electrical trauma injury?

THE COURT: Condition is consistent with someone. I'll let him testify to that.

MR. O'DONAGHUE: Okay.

THE COURT: Of course that opens up cross-examination on it, but no, that's fine.

MR. TOBIN: And she's probably—

MR. O'DONAGHUE: That's—

THE COURT: And then I'm going to—I agree with counsel here that Dr. Mary, I'm going to bar her altogether.

MR. O'DONAGHUE: All right. Just one last point, Judge, and then we can move on. That's what Dr. Mary was going to testify to, that his condition, current condition is consistent with someone who suffered an electrical trauma injury.

THE COURT: Well, you're going to have Pliskin to testify to that, we don't need her.

MR. O'DONAGHUE: Okay, so are you barring her—

THE COURT: Plus I just don't—

MR. O'DONAGHUE: —because it's cumulative then?

THE COURT: What?

MR. O'DONAGHUE: Are you barring her because you consider it—

THE COURT: No, not—

MR. TOBIN: You're trying to—

MR. O'DONAGHUE: —cumulative?

MR. TOBIN: You're trying to bait the Court.

THE COURT: —for that reason. I'm barring her because—I'm barring her—I'm trying to, I guess this is like trying to—

MR. CONNELLY: It's for all the reasons you've said in the last two hours. (Laughter.)

THE COURT: I just—I hate to bar witnesses, but I just don't see where Dr. Mary is going to be able to add anything to the education of the jury, and I'm going to bar her. I will allow Dr. Pliskin to testify that his IQ is such and such, and he can't do his prior work and if you ask him, I'll allow you to ask him whether the kind of condition that he has, based on the tests, could be consistent with someone who has been hit by a bolt of lightning or however that goes. I'll let you—That will be the extent of that.

MR. O'DONAGHUE: Judge—

THE COURT: But Dr. Mary is out.

MR. O'DONAGHUE: Judge, will you allow us to do an offer of proof on Dr. Mary?

THE COURT: To—You want to make an offer of proof?

MR. O'DONAGHUE: Have her testify outside the jury, preserve the record. Isn't here—

THE COURT: No, I don't think so. I won't allow that. The record will be preserved. I've been here for what, over an hour this morning? And you can get a transcript of this and the record is preserved, and frankly—

MR. O'DONAGHUE: But there's—

THE COURT: Frankly I would like to see this type of ruling, well, hopefully maybe I shouldn't because that means you'd lose the case. (Laughter.)

THE COURT: But I'd like to see—

MR. CONNELLY: That thought occurred to us.

THE COURT: I'd like to see—

MR. O'DONAGHUE: The thought had crossed our mind, Judge.

THE COURT: I'd like to see more of these kind of rulings challenged on the Seventh Circuit.

MR. O'DONAGHUE: That's why I'm asking for the offer of proof, so if this matter does go up, the Appellate Court has the benefit of her testimony.

THE COURT: Well, the offer of proof is right here. The offer of proof is right here in these exhibits.

MR. O'DONAGHUE: That's not her complete testimony though, Judge.

MR. TOBIN: (Inaudible).

THE COURT: This is not—

MR. O'DONAGHUE: It's what they asked her. It's not what we've asked her.

MR. TOBIN: That's her opinions as a 26 witness.

MR. O'DONAGHUE: Judge, the question about her opinions Mr. Tobin asked her was: Do you have any other opinions other than those expressed in your report, and she said no. That's, you know, that's not sufficient. I mean he didn't go into every opinion she has.

THE COURT: Well, that—

MR. O'DONAGHUE: I mean I'm not criticizing the job he did, but I just think if this matter ends up going up, that the Seventh Circuit should be entitled to review her actual testimony to determine if it was appropriate to bar her or not.

THE COURT: I think they can tell from her answers here. I think they have enough here.

MR. O'DONAGHUE: Okay.

THE COURT: I think they have enough here to make that determination. Okay, so she is barred. Uman, Dr. Uman. He's the one that comes with these three or four different possibilities as to how this could have occurred, if the lightning struck?

MR. O'DONAGHUE: Well, part one of Dr. Uman, Dr. Uman is here because originally there was an argument about whether there was any lightning at all. That's why he was chosen as our particular expert, because he's the foremost authority on lightning phenomena probably in the world.

THE COURT: Okay, so . . .

MR. O'DONAGHUE: Since we're now to the point where there's probably going to be an admission that there was lightning, Dr. Uman simply falls into the category of the expert who gets asked the question: Was this tower a reasonably safe workplace and if not, why not? Which really has nothing to do with three different scenarios.

THE COURT: But didn't he go out to this tower five and a half years after the fact, didn't climb up on the tower to see whether the lightning had struck, or (inaudible)?

MR. O'DONAGHUE: He didn't, if you read his testimony, he—and Mr. Connelly and I were there—he looked

but he didn't climb up on top of this tower because he didn't think it was necessary.

THE COURT: And he also is going to testify, though, you want him to testify that they could have done something to make it safe, aren't you?

MR. O'DONAGHUE: Yes.

THE COURT: That they—Something about—

MR. O'DONAGHUE: Surge suppressors.

THE COURT: Yes, those surge suppressors.

MR. O'DONAGHUE: Surge suppressors. The same thing everybody's got on their computers.

THE COURT: Um-hum. And since—and you—

MR. O'DONAGHUE: And that that would make that a reasonably safe place for lightning. Because they didn't have a lightning rod.

THE COURT: Um-hum.

MR. O'DONAGHUE: No lightning rod. And never said there was a lightning rod.

MR. TOBIN: It is a lightning rod. The tower is.

THE COURT: But—

MR. TOBIN: Because it's grounded. It's all steel.

THE COURT: And I take it that these surge suppressors are not there? Were not there?

MR. O'DONAGHUE: No.

THE COURT: He's testifying that—

MR. TOBIN: No. He doesn't know. He didn't have any idea whether they're there or not.

THE COURT: That's what I was asking.

MR. O'DONAGHUE: That's not what he—

THE COURT: Does he know whether there was or not?

MR. TOBIN: No, he doesn't have any idea at all.

THE COURT: Then aren't you placing the burden on the defendant to prove that there were surge suppressors? If he testifies that there should have been surge protectors,—

MR. O'DONAGHUE: He will testify that in what he examined in this tower, in the basement, in the wires coming out of the ground and the wires going in, where there should be surge suppressors there were none.

MR. TOBIN: And—

MR. O'DONAGHUE: And in the absence of the surge suppressors from his inspection, to a reasonable degree of electrical engineering certainty, that tower is not reasonably safe. The defendant's expert comes in and says well, gee, guess what? Ten feet away there were surge suppressors. Or if they can ask him that question on cross and prove it with their expert, that's not a Daubert question.

MR. TOBIN: He didn't—

MR. O'DONAGHUE: That's the clash of the experts.

MR. TOBIN: He didn't testify that there were not surge suppressors. He testified if there were—and he didn't know whether there were or not surge protectors, this tower was perfectly safe. That's what his testimony is.

MR. O'DONAGHUE: It—

MR. TOBIN: He testified that it is grounded as well as a tower of this type can be grounded. Then he gave his

four scenarios as to where he thought the lightning could have struck, and then it reaches to the fact that it has to hit someplace out in the yard and there'd be no surge protector on the particular line that Mr. Walker had his fingers on at the time, because if it hit any other line it wouldn't affect him because he didn't have his fingers on them. So we have the speculation on a speculation, where does this lightning hit? What does it affect? And what does it do? And that is pure speculation, as far as I can see.

THE COURT: Well, I tend to—after reading his deposition, first of all, I was kind of confused as to what he was—In fact I read this at four o'clock this morning, and tried to figure—I got off my bed this morning and read this stuff to try to figure out what he was saying, and that's basically—all I could see there was speculation, speculation, speculations. And I think that's too much speculation for a jury. I'm going to bar it. I'll bar Dr. Uman.

MR. O'DONAGHUE: You're going to bar his testimony altogether, Judge?

THE COURT: Yes. Yes.

MR. O'DONAGHUE: Judge, can we do an offer of proof on Dr. Uman?

THE COURT: In something—We've got his deposition here. I think it's obvious why he's being barred.

MR. CONNELLY: And his report, Judge, which is his Rule 26 report? (Pause.)

MR. O'DONAGHUE: I take it that's no? (Laughter.)

THE COURT: That's no.

MR. CONNELLY: Thank you, your Honor.

THE COURT: All right. But I think it's obvious here.

MR. CONNELLY: I think we just have a couple of small ones, Judge. We went through the non-Daubert—

THE COURT: Now when—

MR. CONNELLY: I'm sorry.

THE COURT: Now that Dr. Pliskin is going to be precluded from testifying about the pre-morbid functioning IQ, is there a need for the Madden State mental health record? I don't think so.

MR. TOBIN: Yes, there is, your Honor.

THE COURT: Why?

MR. TOBIN: Because it explains why he would have these same signs that Dr. Pliskin says he has, of depression and mental problems are caused by—

THE COURT: His current condition?

MR. TOBIN: Yes, his current condition, is caused—and the Madden State shows that he had it and had it three times in the seventies and he will have it again, and he also has it in Hartgrove Hospital that they don't have in there. When you take the combination that he was in the Hartgrove Hospital that Dr. Pliskin doesn't consider, and he says in his deposition that all of those things can explain the depression and the fact that he's doing poorly on the particular tests that he's given.

United States District Court
Northern District of Illinois

JUDGMENT IN A CIVIL CASE

Richard Walker

v. Case Number: 93 C 3861

Soo Line Railroad Company

☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the Court enters judgment in favor of the Defendant Soo Line Railroad Company and against the Plaintiff Richard Walker.

Michael W. Dobbins, Clerk of Court

/s/ Vernita K. Davis
Vernita K. Davis, Deputy Clerk

Date: 11/24/98